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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

vs.

SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

RUSSELL T. MOUNT,
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New York 5, N. Y.

WALTER B. HALL,
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Of Counsel.

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MEMORANDUM FOR THE RESPONDENTS IN REPLY TO *AMICUS CURIAE* MEMORANDUM OF THE UNITED STATES.

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New York 5, N. Y.

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RESPONDENTS' BRIEF.

Statement.

This case is before this Court on a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the unanimous decision of that Court, which dismissed the libel (197 F. 2d 795, R. 792-802).

Except that this case and *Calmar Steamship Corporation* v. *United States* (Docket 262) were tried on the same record, the two cases have nothing in common. The issues are entirely different.

In this case the basic question is whether the respondents' war risk policies covering the *Portmar* on a commer-

cial round trip voyage from United States to the Philippines (subsequently changed by agreement to round trip voyage from United States to Australia) still covered the *Portmar* on February 16 and 19, 1942, when she was damaged by bombs and gunfire from Japanese war planes in the Timor Sea and at Port Darwin, while under requisition by the United States Army, and while being used on a *military expedition* in an active war area where Japanese attack was momentarily expected.

The District Court found that the Army had taken over the *Portmar* completely for war purposes (R. 718), and had "prevented the homeward voyage" and sent the *Portmar* on to Timor (R. 747). The Court of Appeals likewise found that the *Portmar* had been taken over by the United States Army at Brisbane January 5, 1942, and that this had "put an end to the possibility of that return voyage for which alone the Underwriters meant to insure her." (R. 794) and held:

> "We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802).

On November 26 and 27, 1941, the petitioner, through its London broker, Thos. Stephens & Sons, Ltd., insured the *Portmar* with the respondent Underwriters in London, as a commercial cargo vessel, by war risk policies on hull, on a round voyage from a United States Pacific port to the Philippine Islands and return to the United States, for a premium of 1½% (Lloyd's Policy, reproduced on p. 71 of the Record, is one of the three similar policies in suit). The petitioner correctly describes the *Portmar* as "a cargo vessel" (Brief, p. 2).

For the sake of brevity, we do not repeat the movements of the vessel which are detailed in the opinion of the Court

of Appeals. They are vividly plotted on the map, Petitioner's Exhibit 53, which is included in the separate volume of exhibits filed with this Court by the petitioner. A photostatic copy of Exhibit 53 is attached to this brief, as an Appendix. We do emphasize, however, what the Court of Appeals found as facts, namely; that by the time the *Portmar* reached Sydney December 30, 1941, the Japanese had sunk the British Battleships "Repulse" and "Prince of Wales", and this, following upon the substantial annihilation of the United States Fleet at Pearl Harbor "gave the Japanese full battle fleet command of the Pacific" and a "naval superiority which enabled them to transport troops to almost any desired point and establish it for an air-naval fueling base" (R. 793); that Australia's "northern coasts at any rate were in the direst straits * * * and Japanese carriers could range about unobstructed; and Japanese forces might land where they would, substantially unopposed" (R. 795); that when the *Portmar* reached Brisbane January 5, 1942, the United States Army took her over, discharged her cargo, sorted it and reloaded part of it together with new cargo, and sent her north to Port Darwin on the north coast of Australia, about 2,100 miles distant from Brisbane (R. 793, 794), into the very waters from which she had been diverted for safety's sake; and that after a side trip from Port Darwin westward to Wyndham with 2,000 drums of high octane gasoline, the Army ordered her back to Port Darwin, and there loaded her with 300 to 400 officers and men of the 148th United States Field Artillery, field guns, ammunition, supplies and a naval launch, and sent her from Port Darwin on February 15, 1942, as part of an extremely dangerous "military expedition" "to reinforce the defense of Koepang across the Timor Sea, north of Australia" (R. 794).

The degree of danger to the *Portmar* on that "military expedition" is clear from the fact that it was common knowledge in Darwin that an Empire Airways flying boat had been destroyed by enemy action en route from Darwin to Koepang on January 29, 1942 and that Japanese war planes had bombed Koepang on February 1, 1942 (R. 405, 406, 1943 World Almanac, 61), and was vividly described by the Commander of the Cruiser *Houston* when he briefed Captain Michelson of the *Portmar* on board the cruiser on the night of February 14, 1942, as testified by Captain Michelson himself, as follows:

> "Captain Rooks he told us four merchant captains that it would be a very dangerous mission and he said 'Gentlemen, Koepang Harbor is going to be a hot place. I don't even dare to take you into Koepang Harbor, I am going to take you up to the entrance and then, gentlemen, I am sorry to say I got to get out, you got to get in and do the best you can' " (Michelson, R. 405).

The *Portmar* was completely taken over by the United States Army at Brisbane January 5, 1942, regardless of her commercial commitments (R. 795), and was thereafter used solely as a unit of the Army's fighting forces in the prosecution of the war. She was kept by the Army in the northern waters of Australia continuously for one month from her arrival at Port Darwin January 19, 1942 until she was bombed at Port Darwin February 19, 1942, while the troops, the guns and ammunition were still on board (R. 325, 348, 479, 724, 725). That employment and those movements were in no way part of, or connected with, the round trip commercial voyage on which she was insured by the respondent underwriters.

There is no substantial dispute as to the facts. Even "the costs of all damage repairs necessary to restore the

Portmar to the condition she was in prior to being bombed" were fixed at £28,000 Australian currency ($91,000) by a joint survey made and signed by representatives of petitioner, United States and respondents. (R. 651). What happened on the voyage and in Australia appears entirely from the testimony of petitioner's own witnesses, taken prior to trial, and of Government witnesses given at the trial—in particular, Col. Thomas G. Plant, Chief of the United States Army's Water Transportation in the Southwest Pacific Area. Respondents had no representatives in Australia except the two surveyors appointed to participate in the joint survey above mentioned.

The contention of the Government in its Memorandum as *amicus curiae* that "The United States is financially interested in the outcome of this suit" (p. 2), is not correct. The petitioner's suit against respondent underwriters in this case is under hull voyage insurance policies on the *Portmar*. The petitioner's suit against the United States in Case 262 is for breach of the terms of the charter party of the *Portmar*, which was chartered by the petitioner as owner to the United States as charterer. The charter is not referred to anywhere in the respondents' policies (R. 71), and the petitioner so admits (Brief, p. 21). There is no evidence that the respondents even knew the *Portmar* was under charter. The petitioner also has pending against the United States in the Court of Claims a proceeding (No. 48,509) to recover for the damage sustained by the *Portmar*, and also for "just compensation" for the requisition of title to the *Portmar* (in her partially repaired condition at Brisbane November 17, 1942) by the United States under Section 902 of the Merchant Marine Act, 1936; 46 U. S. C. 1242 (R. 703, 803, 513).

If respondent underwriters had been held liable to the petitioner in this case, they would then have been subro-

gated in full to all the rights of the petitioner against the United States in the Court of Claims proceeding. *United States* v. *American Tobacco Company* (1896), 166 U. S. 468; Rules of the Court of Claims, Rule 25 (c). It can, therefore, make no difference to the United States whether its liability to the petitioner is for the petitioner's own account, or for account of subrogated hull underwriters, if, contrary to the Court of Appeals' decision, hull underwriters were to be held liable to the petitioner in this case.

The United States is not mentioned in the respondents' policies (R. 71), and is not an assured under those policies. That the United States paid the premium for the insurance, as stated on page 2 of the *amicus curiae* memorandum, is immaterial. It is settled law that the charterer who has, by its own acts, brought about damage to the insured vessel is liable to the vessel's hull insurer who has paid for such loss under its policy,—even though the charterer had paid the insurance premium. *White* v. *Upper Hudson Stone Co.* (1917 C. C. A. 2C.), 248 Fed. 893, cert. den. 246 U. S. 665, and *Kennelly* v. *Frederick Starr Contracting Co.* (1918 C. C. A. 2C.), 250 Fed 229.

Petitioner's Assignments of Error in the present proceeding.

In order to narrow the scope of the argument, respondents herewith submit as to each of the petitioner's six alleged errors *(Brief,* pp. 14, 15) a summary sentence indicating respondents' position as to each, and referring to the place in this brief where each is discussed.

1. Petitioner complains that even though the round voyage of the *Portmar* was frustrated, the policies did not thereupon terminate.

Reply: When an insured voyage ends, hull policies insuring the vessel on such voyage end. Discussed, pp. 18-20.

2. Petitioner complains that the declared intent of the parties (presumably petitioner and respondents), as shown by the policy provisions, were not enforced.

Reply: All provisions of the policies relating to breakup of the voyage and resultant termination of the insurance, were given due effect. Discussed, pp. 33-45.

3. Petitioner complains that respondents were released from "liability by an implication of an intent not to cover the loss which occurred".

Reply: The Court of Appeals held that the voyage (and with it, the insurance) had terminated prior to the loss (R. 793). It was correctly held that coverage on a merchant vessel ceases when the vessel was devoted to indeterminate service in an active war area, and was completely outside the scope of commercial service (R. 801-2). Discussed, pp. 33-45.

4. Petitioner complains that the principles stated in the *Rickards* decision of the House of Lords were not applied to the present controversy.

Reply: The *Rickards* case involved cargo insurance, not hull insurance, and the House of Lords in that case pointed out that, differing from cargo insurance, hull insurance does not insure that the vessel shall complete the insured voyage. Furthermore, the policies in the *Rickards* case did not contain an exclusion clause equivalent to the Free of British Capture Clause of the *Portmar* policies. The *Rickards* case and the decision of the Court of Appeals in the present case are in complete harmony. Discussed, pp. 50-55.

5. Petitioner complains that respondents' agreement to substitute "Australia" for the "Philippines" was not given any effect.

Reply: The Court of Appeals described the "prescribed voyage" as "a round voyage from San Francisco to Australia and Philadelphia" (R. 801), thus giving full effect to the amendment. Discussed, pp. 30-33.

6. Petitioner complains that the voyage was held to have been broken up before the loss occurred.

Reply: As shown in the first three points of this brief, the insured voyage was in fact broken up, not only on the specific grounds stated by the Court of Appeals but in other respects which the Court found it unnecessary to consider. Discussed, pp. 8-69.

FIRST POINT.

The Court of Appeals correctly held that the insured voyage and the policies terminated prior to the *Portmar's* damage.

The record establishes the *fact* that from and after the time the Army took over the *Portmar* completely at Brisbane, January 5-9, 1942, there was no longer any reasonable prospect of her continuing the insured round voyage. After the *Portmar* had been diverted to Suva and thence to Southern Australia *for safety*, and had arrived at Sydney on December 30, 1941, she was sent north 529 nautical miles to Brisbane. There, under orders of the United States Army, her cargo was discharged and sorted on the dock. Under United States Army orders part of her original cargo and, in addition, cargo from other vessels that had arrived at Brisbane were laden on the *Portmar*

(R. 285-7, 404, 455, 719) and she sailed north from Brisbane on January 9, 1942 right back into the waters from which she had been diverted for safety, proceeding a further distance of 2,097 nautical miles [according to the "Table of Distances between Ports" published by the Hydrographic Office of the United States Navy Department] through Torres Strait and thence westerly to Port Darwin (R. 287, 455-6, 719). It is beyond question, and was insisted upon at the trial by the petitioner, that on and after January 5, 1942, when the *Portmar* arrived at Brisbane, every order and direction given to the master and every movement of the vessel was related solely to the prosecution of the war. No prospect of the vessel's completing a return voyage to the United States within the foreseeable future, either with or without cargo, existed.

In his opening statement to the District Court, the attorney for the Government stated:

> "The situation in Australia at that time was critical. We intend to show just how critical it was. The Japanese were at the point of their greatest expansion. The Navy had withdrawn from the waters north around Port Darwin, invasion was momentarily expected, the islands of the East Indies were under Japanese attack, Japanese invasion, and the military at that time was controlling every vessel, every cargo, every piece of equipment that had value whatsoever in a military sense with a view to using it for military purposes as military necessity dictated. They were not inquiring into whether the United States was the charterer, or the property belonged to X, Y or Z. They were finding out what ships were in Australian waters, what material was available to the armed forces of the United States and of Australia to meet the Japanese threat, and were ordering that material sent where it was needed most.

"After the Army learned of the nature of the *Portmar's* cargo, after it had been given details as to the *Portmar's* characteristics and so forth, the Army gave military orders, which the master received in Brisbane, to have the material taken off the vessel, sorted, accurately appraised for usefulness, and gave other orders which caused a good deal of it to be reloaded together with certain other cargo, and the material sent up to Port Darwin where the invasion was expected" (R. 101-2).

The testimony of Colonel Thomas G. Plant, the United States Army's Chief of Water Transportation in the Southwest Pacific area (R. 183), gives the facts on which the Government's opening statement was based.

Colonel Plant testified that he arrived in Australia the end of March, 1942 (R. 183), and that his initial job was "to discharge ships that were there, sort out their cargo, find out what they had, and to find out where they could be used to the best advantage" (R. 185), and "the procurement and assignment of all vessels on all military and supply missions. • • • every vessel we could get our hands on" (R. 186).

"Australia's life depends on coastal shipping and they were desperate for covering their own needs, so we had very few Australian vessels we could depend upon. Some 21 small Dutch vessels had escaped when the Dutch East Indies were seized by the Japanese, and some of those were heavily bombed and damaged. We got those and repaired those. In the meantime, we were looking around desperately for anything that was afloat or could be made to float" (R. 186-7).

and

"Q. Did it make any difference with respect to the control which you exercised over vessels at that

time whether or not they were owned or chartered to the United States or any government? A. None whatsoever.

"Q. In making decisions with respect to dispatching vessels to various points did you regard commercial considerations of any sort? A. No, sir, military only.

"I was given very complete authority in Washington to take any ship in Australia and to do what we pleased with it" (R. 187, 188).

Col. Plant testified that the United States Army Transportation Service had exercised the same authority and control from very shortly after December 7, 1941, when many ships had been diverted to Australian ports (R. 188).

The dire situation which confronted the Army in Australia at that time is vividly recorded by Prime Minister Winston S. Churchill in his volume "The Grand Alliance" (1950). At page 614, he states that on the night of December 9, 1941 he convened a meeting of the British Admiralty in the Cabinet War Room "to review the naval position", and adds:

> "We had lost the command of every ocean except the Atlantic. Australia and New Zealand and all the vital islands in their sphere were open to attack."

That was the day before the *Prince of Wales* and the *Repulse* were sunk (id., pp. 618, 619). Referring to their loss he says at page 620:

> "There were no British or American naval ships in the Indian Ocean or the Pacific except the American survivors of Pearl Harbor, who were hastening back to California. Over all this vast expanse of waters, Japan was supreme and we everywhere weak and naked."

On December 10, 1941 the Prime Minister wirelessed to Mr. Eden (at sea):

> "United States have now only two battleships effective in Pacific against ten Japanese. * * * According to American sources, we are going to be heavily attacked in Malaya and throughout the Far East by Japanese enjoying command of the sea."

On December 12, he wirelessed Mr. Eden (at sea):

> "The loss of the *Prince of Wales* and *Repulse*, together with United States losses at Pearl Harbor, gives Japanese full battle fleet command of Pacific. They can attack with any force overseas at any point" (p. 624).

On December 20, 1941 he wrote, in Washington:

> "The Japanese have naval superiority which enables them to transport troops to almost any desired point, possess themselves of it, and establish it for an air-naval fueling base" (p. 652).

The NEW YORK TIMES of December 13, 1941, page 5, contains a United Press dispatch from Melbourne, Australia, dated December 12, which reads in part:

> "Workers were digging trenches in the parks of Sydney and building pill-box defense posts in the streets of Brisbane today as Australia made ready to meet any Japanese invasion."

The NEW YORK TIMES of December 17, 1941, page 8, contains a wireless dispatch from Canberra, Australia, dated December 16, which states:

> "The War Cabinet also directed the evacuation of all woman and children from Darwin, except women in essential services."

That was more than three weeks before the Army sent the *Portmar* from Brisbane north to Port Darwin.

Captain Michelson corroborated the foregoing. Speaking of conditions at Sydney at the end of December, 1941, he said that the waters had been mined, that German raiders had sunk a lot of British vessels, and that the Japanese were very much complete masters of the ocean routes and in control of the seas north of Australia. The Australian Naval vessels were afraid to even approach the *Portmar* on her arrival at Sydney in December 1941 because of a suspicion that, in spite of prominent American marking, it was an enemy vessel. By the time the *Portmar* had reached Brisbane on January 5, 1942, Captain Michelson knew that the situation north of Australia had noticeably deteriorated (R. 519-22, 526).

That the United States Army did not intend to allow the *Portmar* to complete her round-trip commercial voyage, is further established by the fact that, even after she was damaged, when Captain Williams, then head of his own private salvage company (R. 684, 694) told Colonel Plant he had salvaged the artillery from the *Portmar* and that he was sure he could raise the vessel, Colonel Plant ordered him to "Get it afloat" (R. 188, 189, 198); and when Captain Williams reported to Colonel Plant that the *Portmar* was afloat, Colonel Plant made arrangements with Captain Williams to have the vessel towed to Brisbane (R. 189, 191), because she was still useful "to the Army" if she could be taken to a place for repair (R. 193).

When the *Portmar* arrived back at Brisbane in July 1942, the Army maintained exclusive control of the vessel and made temporary repairs by Army personnel and some local mechanics, with materials taken from the wreck of another vessel and a scrap pile in the shipyard. Captain

Michelson was not allowed to board the vessel until he got written permits from both the United States Army and the salvor, Captain Williams (R. 195, 201, 211, 737, 770).

United States Army Captain Haggett, in charge of repairs at Brisbane, commenced that work "early in September" (R. 201), two months before the Government took title to the vessel on November 17, 1942, and his orders "were to do only what would permit the vessel to be operated in Australian waters during the war" (R. 201, 268).

From Brisbane the Army took the *Portmar* to Sydney under her own power for drydocking and further repairs, and on completion of the Sydney repairs, the Army put the *Portmar* back into commission, and used her on two or three trips until she was torpedoed and sunk while carrying cargo for the Army (R. 196).

It is clear from the above that when the United States Army took the vessel over at Brisbane January 5, 1942, and converted her into an Army vessel for use in the prosecution of the war, there was no longer any possibility of her completing the commercial round voyage. That voyage and the insurance covering that voyage were then and there broken up and terminated.

In Conclusions of Law, the District Court held:

> "The insured voyage was never voluntarily abandoned or terminated by libellant, the *Portmar* or her master. * * * It was only because of the intervention of a sovereign that the return voyage was not commenced. * * * It was the act of paramount power which *prevented the homeward voyage* and sent the *Portmar* on to Timor" (R. 746-7). (Italics ours.)

The Court of Appeals held:

> "* * * we hold that the policy was no longer in force when the loss occurred, the insured voyage having

before then come to an end and the policy with it" (R. 793).

and again:

"* * * we hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802).

The testimony amply sustains the *fact* that the *Portmar's* round-trip commercial voyage, which was what the respondents insured, was broken up when the United States Army took her over completely for use solely in the prosecution of the war, at Brisbane, between January 5 and 9, 1942.

A vessel's voyage is broken up when her movements cease to be within the voyage described in the contract. This has been held as to all the vessel's relationships, viz. in cases involving crew contracts, time charters, contracts of affreightment and insurance contracts.

In a case involving a claim by a seaman's wife under an allotment slip for wages arising after his vessel, the *Coralie Horlock*, had been detained at the port of Hamburg by German authorities on August 4, 1914 when the First World War broke out, the House of Lords, after extended analyses of many frustration decisions, held that such detention *for an unpredictable period*, operated to *terminate the voyage and the ship's contract to pay wages, immediately* and before the date for termination specified in the ship's articles. *Horlock* v. *Beal* (1916) 1 A. C. 486; 13 Asp. M. C. 250.

In *Borup* v. *Western Operating Corporation* (1942, 2 Cir.) 130 F. 2d 381; Cert. Den. 317 U. S. 672, it was held that where a round voyage is prevented by act of Government for a period which, even though not perpetual, is at that moment of *indefinite duration*, i.e. more than a short

temporary interruption, the voyage is in law broken up and terminated. In that suit, a libel by Norwegian members of the crew of an American whaling ship sought to recover wages which by contract between shipowner and crew were to continue "under all circumstances until the crew's arrival at the place of signing on". The voyage was from Sandefjord, Norway, where the crew signed on, to the Antarctic and return to Sandefjord. By Presidential Neutrality Proclamation of April 10, 1940, while the ship was on the return trip to Norway, she was prohibited from returning to Norway, and therefore put into an American port. The Court of Appeals held that *both the round voyage with return to Sandefjord, and the wage contract for that voyage,* were terminated by the United States Government's act, which was then obviously of indefinite duration. As Judge Hand said, the prevention, though not perpetual, "was not likely to change" (p. 386).

Likewise in the case of time charters, such as Judge Learned Hand analyzed in the present Court of Appeals' decision (R. pp. 799-800), those charters have been held frustrated and terminated when continued performance has been rendered impracticable or impossible because of governmental restraint of indefinite extent which was likely to outlast the charter term.

In *The Claveresk* (1920, 2 Cir.) 264 F. 276 [approved in *Omnia Commercial Co. v. United States* (1922) 261 U. S. 502, 512], where the British Government requisitioned a British vessel, the Court held that the time charter was terminated although it had fourteen months to run until expiration date, saying

> "In the present instance, what ceased to exist was Sutherland's (the owner's) control of the *Claveresk;* that swept away the foundation of contract, as might a fire or shipwreck." (264 F. 283-4)

So also in *Allanwilde Corporation* v. *Vacuum Oil Co.* (1918) 248 U. S. 377, which brought before this Court four certified questions relating to the frustration of a contract *voyage* resulting from a United States Government embargo against the departure of sailing vessels during the First World War. The vessel *Allanwilde* loaded her contract cargo and, in accordance with the contract of affreightment sailed from New York for European ports. After she had proceeded about 500 miles, the vessel encountered a storm and was forced to return to New York for repair. When the repairs were completed, clearance was refused. In holding both the voyage and the contract of affreightment terminated, this Court said (p. 386):

> "And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed, or transported in a vessel not subject to it. We cannot concur in either contention. *The duration was of indefinite extent.* Necessarily the embargo would be continued as long as the cause of its imposition,—that is, the submarine menace,—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation." (Italics ours)

Likewise in *Texas Company* v. *Hogarth Shipping Company* (1921), 256 U. S. 619, this Court held that a *voyage charter* was frustrated, even before the voyage commenced, because the ship had been requisitioned. The principle involved is illustrated in the numerous citations in this Court's opinion in the *Texas Company* case at p. 630.

Lord Sumner, writing for the Judicial Committee of the Privy Council, in *Hirji Mulji* v. *Cheong Yue S. Co.* (1926) A. C. 497; 17 Asp. M. C. 8, said:

"Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention, or their opinions or even knowledge, as to the event, which has brought this about, but on its occurrence under such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on the 4th August, 1914, in *Horlock* v. *Beal* (1916) 1 A. C. at p. 528. Sometimes the frustration is evident when the gravity and the circumstances of the breakdown can be known, as in *Bensaude's case* (1897) A. C. 609; 8 Asp. M. C. 315; *sometimes as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and fortiorari when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically.*" (Italics ours)

The law is the same as to insurance contracts. In *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. (N. Y.) 88, where a cargo policy contained a warranty against being turned away from Bordeaux, the destination of the insured voyage, and the vessel was turned away by the French Government, Chancellor Kent, referring to that warranty, said at page 94:

"The plaintiff assumed the risk of such a peril upon himself. * * * The defendant cannot be responsible for subsequent events. The risk terminated at Bordeaux, for the policy did not provide for a continuation of risk, in case of a prohiblton to enter, founded on an illicit trade, nor for leave for the plaintiff to go elsewhere. The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk, by the landing of the goods. The policy had completely spent itself, when the prohibition intervened."

And in *Marshall* v. *Delaware Ins. Co.* (1808) 4 Cranch. 202, it was said of an insured voyage:

> "But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage." (p. 207).

The very decision on which petitioner based its application for the present writ, *Rickards* v. *Forestal, etc. Co.* [1942] A. C. 50, 111, specifically held that the voyages of the three German vessels (carrying the insured cargo) were terminated when restraint by the German Government compelled the masters to depart from the insured voyages.

A Voyage Policy on a vessel is only coextensive with the voyage as described in the policy. Arnould, Marine Insurance (13th Ed.) Sec. 370 states:

> "* * * for it is an elementary principle in this branch of insurance law that the underwriter cannot be liable for a loss which does not take place in the course of prosecuting the very voyage described in the policy."

The law in the United States is the same. In *Audenreid* v. *Mercantile Mut. Ins. Co.* (1875) 60 N. Y. 482, 485-6, the New York Court of Appeals said:

> "In an insurance upon a specific voyage the commencement and termination are given, * * *. If the insured may break up a single voyage between the termini named in the policy, at his own pleasure or for his profit or convenience, into several, by stopping at intermediate ports, he may essentially vary the risk, and the estimate of the underwriter will be of no value." (p. 485)
>
> "In the absence of any usage or stipulation to the contrary, the meaning of the parties to the policy is

> that the ship shall proceed from one terminus of the voyage insured, to the other, in a direct course, with all due expedition and without touching at any interjacent port, or pursuing any intermediate adventure." (p. 486).

In *Northwestern SS. Co., Ltd.* v. *Maritime Ins. Co., Ltd.* (1908 C. C. W. D. Wash.) 161 F. 166, 178, the Court said:

> "A policy insuring a ship for a voyage insures only for the particular voyage intended, which must be prosecuted with diligence and by the most direct and practicable known route."

If the insured voyage is prematurely terminated, the insurance coverage is also terminated. Phillips on Insurance (5th Ed.) Sec. 967, states:

> "The risk ends when the voyage is intercepted and broken up, although it is by a peril not insured against."

The Insured Voyage of the *Portmar*.

The "prescribed voyage" or the "insured voyage" of the *Portmar* is clear. The original "insured voyage" was a round voyage to the Philippines and return. On January 24, 1942, the petitioner through its American broker, Mather & Co., cabled its London broker, Thos. Stephens, Ltd.:

> "*PORTMAR* DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO."

(Exhibit 4, R. 586.)

That was all that respondents were told. Respondents' reply to petitioner's London broker is set forth in Stephens' letter to Mather reading:

> "We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been *diverted to Australia on the outward voyage under Government orders.*
>
> We confirm that all Underwriters on our War Risk Policy have agreed to hold *this diversion* covered pending your further advices. (Italics ours.)
>
> Yours truly,
>
> Thos. Stephens & Sons, Ltd.
>
> H. Stephens,
> Director"
>
> (Exhibit 5, R. 593.)

Respondents' agreement, stated in that letter, was not that respondents would cover the *Portmar* everywhere until further advice, but that respondents would cover "this diversion", i.e. a diversion *"to Australia on the outward voyage"*, pending further advices. Respondents' agreement was only to cover a changed *round voyage*,—not, as petitioner claims, everything that might have happened up to February 6, 1942, the date of Stephens' letter.

The District Court held:

> "The policies in suit were written for a round voyage. The cable of the underwriters changed and modified the coverage only to the extent of changing the port of destination on the outward voyage 'to Australia' instead of 'to the Philippines'" (R. 744).

The Court of Appeals held the same, describing the "prescribed voyage" as "from San Francisco to Australia and Philadelphia" (R. 801).

(The petitioner's brief refers to the above agreed amendment of the "insured voyage" as a "special 'held covered' agreement". It should not, however, be confused with the printed clause in the policy referring to Deviation, which both parties agree applies only to a *voluntary* deviation or change of voyage [Petitioner's Brief p. 27], and which has been referred to throughout the present litigation as the "held covered" clause.)

The Policy Warranty against Claims Arising from Restraint, Detainment and Requisition.

The *Portmar* policies contained a "Free of British Capture" rider marked "B. C. 2", an American rider printed and affixed to the policies by the petitioner's American broker prior to their being sent to London for signature by the respondents (R. 263, 264). Under the first clause of that rider restraint, detainment and requisition by Great Britain or any of her Allies are excluded from the coverage (that the last half of that rider and the movements of the *Portmar* do not take this case out from that warranty, is discussed fully *infra* at pp. 33-45 of this brief, where the entire rider is analyzed and discussed as a whole). There can be no reasonable doubt as to the meaning and effect of the first part of that rider. The witness Winter, whose qualifications were readily conceded (R. 245), and whom petitioner has quoted herein as an authority (R. 812-3), stated that those words constituted an absolute exclusion and freed underwriters of any responsibility for restraints by Allied powers (R. 249). The District Court agreed with that view (R. 250). Those views are in complete agreement with reported decisions. Where a policy warranty excludes a

risk, the assured himself assumes that risk. *Aktiebolaget M. Bank* v. *American M. M. Ins. Co. (The Ada)* (1925) 241 N. Y. 197, 211; *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. (N. Y.) 88; *Graham* v. *Pennsylvania Ins. Co.* (1807) F. Cas. 5,674, 2 Wash. C. C. 113, 120. There is not a single judicial decision to the contrary. Nor has the petitioner cited a single decision holding that where a voyage (round-trip or otherwise) has been broken up by an *excluded* peril, the insurance was thereby extended for any purpose, or liability decreed thereunder against underwriters.

In *Standard Oil Co.* v. *United States (The Llama)* (1925) 267 U. S. 76, which concerned *hull* insurance on the *Llama* against war risks, the vessel on a voyage from New York to Copenhagen was stopped by a British warship, and ordered to Kirkwall. While so proceeding, she struck a rock and was totally lost. This Court held that the loss was from a war risk, not a marine risk, and said at page 78:

> "Whatever happens *while the taking insured against continues,* fairly may be attributed to the taking. That is a non-conductor between the assured and subsequent events. See *Muller* v. *Globe & Rutgers Fire Insurance Co.,* 246 Fed. 759, 763." (Italics ours.)

Anderson v. *Marten* [1908] A. C. 334, in the House of Lords, completes the picture. In that case, suit was against marine underwriters to recover for stranding and wreck of a vessel which had been arrested and sent to Japan, and which stranded during that diversion. The House of Lords held that the loss was from capture, and because restraints were excluded from the policy by an express warranty, marine underwriters were not liable for stranding loss *during* the period of restraint—irrespective of whether the Japanese Prize Court after loss of the vessel condemned her or released her.

In the present case, the District Court correctly held:

> "The restraints under which the *Portmar* was operating were the proximate cause of the damage she sustained *Standard Oil Co.* v. *United States (The Llama)* (1925) 267 U. S. 76, 78" (R. 747, 748).

It is thus established by both this Court and the House of Lords that if restraint, etc. (by the Government of Great Britain or any of its Allies) are *excluded* from the policy coverage, then all damage sustained *during such restraint* is excluded. In *Aktiebolaget M. Bank* v. *American M. M. Ins. Co. (The Ada)* (1925), 241 N. Y. 197, a group of actions by the vessel owner against war risk underwriters for loss of the *Ada* by enemy torpedoes, the policies contained a clause which was in substantially the same language as the first portion of the "Free of British Capture" rider on the *Portmar* policies. It read:

> "Warranted free from any claim arising from capture, seizure, arrests, restraints, preemption or detainments by the British Government or their Allies" (241 N. Y. 204).

The insured voyage was "From New York to Gothenberg (Sweden), whilst there and return to United States Atlantic port or ports, direct or otherwise". On the return trip from Gothenberg the vessel was hailed by a British man-of-war and ordered into Stornoway, Scotland. From there she was ordered by the British authorities to proceed to Bristol, England, where she remained under the direction of the British Government until April 21, 1917. On that date the British authorities gave her permission to sail to New York, but she was unable to commence that voyage because of (by then) insufficient coal on board. The British authorities then agreed to furnish her sufficient

bunker coal to complete her voyage to New York, provided that she first discharge the cargo she had loaded at Gothenberg, carry a cargo from Bristol to Gothenberg and a return cargo to an English port. Under these circumstances the *Ada* discharged her cargo at Bristol, loaded a cargo of coal and carried it to Gothenberg, Sweden, and there took on another cargo, and sailed for Hull, England. On this last mentioned voyage she was sunk by a German submarine and totally lost. The Court held that although it was the intention of the *Ada* and her owners to pick up her cargo again at Bristol and carry that cargo to New York, the voyage from Bristol back to Sweden was a separate and distinct voyage, outside of the insured voyage, and that "The departure from the contemplated voyage, to be excused, must be one necessary to preserve the ship or cargo from imminent peril or danger", and that as such was not the fact, and as the *Ada* was sunk on a voyage outside the insured voyage, the war risk underwriters were not liable.

On the question of the warranty against restraint, etc., the Court then held that if the intermediate voyage from Swansea for Sweden and return to England could be considered forced on the master, as claimed by the plaintiff, the warranty against claims arising from capture, seizure, arrests, restraints or detainments by the British Government excluded from the insurance coverage any loss during such arrest, restraint or detainment, and said:

> "During this time of her seizure and detention by the British government, the vessel came within this clause of the policy and was at the risk of the insured for any damage or loss occasioned thereby. If she had been torpedoed during the time of capture or detention, there could have been no recovery on these policies. (Standard Oil Co. of New Jersey *v.* The

United States, 267 U. S. 76; Queen Insurance Co. of America *v.* Globe & Rutgers Fire Ins. Co., 263 U. S. 487; Andersen *v.* Marten, App. Cases, 1908, p. 334) * * * It may be said, however, that the insured claims that the second voyage was occasioned by the British government; that the voyage was not voluntary; that it was forced upon the master and thus became necessary, avoiding the consequences of the deviation. If this be so and the ship at the time it was sunk was proceeding not voluntarily, but under compulsion of the British government, by force of its orders and commands, or as a direct consequence of its restraints, then this clause does apply, and the insurance companies are not liable'' (241 N. Y. 211).

The Court below, and the petitioner also, so construed the restraint clause. The break-up of the voyage as originally defined, at Suva left petitioner uninsured because the break-up was proximately caused by Allied restraint (*The Llama*, 267 U. S. 76). Petitioner's broker, Mather & Company, appreciated petitioner's predicament. That was the reason (and the necessity) for Mather's cable requesting reinstatement of the coverage and amendment of the policy voyage. The first clause of the "Free of British Capture'' rider expressly excludes from the policy coverage all Allied restraints and all consequences thereof.

On the above authorities the Court of Appeals correctly held:

> The specification of the voyage originally insured, was amended by agreement so that the insured, (prescribed) voyage became a round voyage from San Francisco to Australia and back to Philadelphia.
>
> The prescribed voyage was broken up (frustrated), on January 5 to 9, 1942 at Brisbane, when continuation of the insured voyage became impracticable because of the operation of an excluded peril, Allied restraint.

When the "insured voyage" was terminated, the voyage insurance policies, also, were automatically terminated.

The petitioner has not cited any case to the contrary, nor have we been able to find any.

SECOND POINT.

Petitioner's arguments have no foundation in law or fact.

A. Answering Petitioner's First Point.

Petitioner presented its First Point under seven lettered headings. So far as possible, respondents will discuss the several clauses of the policies in the same order and with the same lettering.

(a) *The form of the policies and the Frustration Clause:* [Petitioner's Point I(a)]

Petitioner's American broker, Mather & Company, prepared and printed the entire policies (except the front and back covers) and sent them to England to be executed by the respondents (R. 262-4). Each policy consists of the American Institute Time (Hull) form of marine risk policy, on the left-hand margin of which is an exclusion known as the "Free from Capture and Seizure Clause" (F. C. & S.). A rider headed "War Risk Clauses" insures the risks excluded by the "F. C. & S." clause, and there is typed on the front cover a provision that the policies insure *only* against the risks of war, etc. On the *Portmar* policies the petitioner's broker then added a rider known as the "Free of British Capture" clause ("B. C. 2") which superseded *pro tanto* the previously-included provisions of the "War Risk Clauses". (A final rider covering damage from strikes and civil commotions is not involved in this case.)

Some of the policy clauses are referred to in the (a) paragraph of petitioner's first point (pp. 20 to 26), but chiefly the "Frustration Clause" of the war risk rider and the paramount "Free of British Capture" rider. Those two clauses were doubtless grouped together in an attempt to give some color to the belated argument *expressio unius, exclusio alterius* based on Judge Hand's mention of it in the Court of Appeals decision (R. 798). Petitioner did not include the Frustration Clause in its libel listing (R. 49-52); did not refer to it in the original appeal (R. 798); did not mention it in its petition for reargument (R. 806-818); and in its present brief (p. 20) concedes that it has no concern herein for underwriters.

The foregoing should have put to rest any question or argument concerning the "Frustration Clause". Petitioner now argues that the presence of that clause should negate *pro tanto* any consideration of frustration within the plain meaning of the later and paramount "B. C. 2" rider. Petitioner's statement (*brief, p.* 21) that both provisions are contained in the War Risk clauses is an oversight. The "B. C. 2" rider was entirely separate and specifically made paramount by the opening phrase: "Notwithstanding anything to the contrary contained in this policy, • • • ".

There is no force whatever to petitioner's belated claim.

The "Free of British Capture" rider will be analyzed (following petitioner's presentation) in lettered heading (d) at pages 43 to 45 hereof.

(b) *The Deviation ("Held Covered") clause of the policies.* [Petitioner's Point I (b)]

The "held covered" clause (usually called the "deviation clause") provides:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of

voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required" (R. 714).

The District Court held (R. 751), and both parties agree (*Pet. brief, p.* 27) that the "held covered" (or deviation) clause becomes operative only where there has been a voluntary deviation or change of voyage, and that it does *not* apply to the present case. That would seem to be a logical end to any discussion of the clause. Nevertheless petitioner undertakes to substitute argument where agreement is lacking.

Although this clause is necessary to avoid automatic termination of the policy in case of a *voluntary* deviation or change of voyage, and petitioner specifically disclaims any such deviation, or change of voyage (*brief, p.* 27), it argues that *a fortiori* if there is a diversion "under compulsion of sovereign control", the coverage "should be held to continue in effect" as a matter of law, even though there is no such provision in the insurance contract. There is no authority anywhere for such a contention, and to state it is its own refutation. Petitioner proposes that this Court inject into the policies an agreement by underwriters, which is not only not in the contract, but which no court or text writer has ever suggested was implied in the contract.

Quite apart from the above, what happened to the *Bortmar* was vastly different from a mere deviation from the insured voyage or a mere change of voyage. It was definitely termination of the prescribed voyage. As shown above such termination results quite independently of the assured's volition and knowledge. *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. (N. Y.) 88; *Anderson* v. *Marten* [1908] A. C. 334.

The character of the events at Brisbane between January 5th and 9th, 1942 was such as to change completely the previous status of the *Portmar*. The vessel was at that moment converted into a unit of the United States military forces. It was thereafter for over a month employed by the Army in the northern waters of Australia, where a Japanese invasion was momentarily expected. The new service to which the *Portmar* was assigned culminated in her being sent as a warship carrying troops, guns, ammunition, and a landing launch on a dangerous military undertaking to occupy and defend the Port of Koepang which had already been bombed by the Japanese. The risk of battle was vividly described by the Commander of the U. S. S. *Houston* who briefed the Captain of the *Portmar* as follows:

> "Captain Rooks he told us four merchant captains that it would be a very dangerous mission and he said 'Gentlemen, Koepang Harbor is going to be a hot place. I don't even dare to take you into Koepang Harbor. I am going to take you up to the entrance and then, gentlemen, I am sorry to say I got to get out, you got to get in and do the best you can'" (Michelson, R. 405).

(c) *The agreed amendment of the originally-insured voyage.* [Petitioner's Point I (c)]

On January 24, 1942, the petitioner through its American broker, Mather Company, cabled its London broker, Thos. Stephens & Sons, Ltd.:

> "*PORTMAR* DIVERTED TO AUSTRALIA
>
> ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO." (Ex. 4, R. 586)

That was all that respondents were told. Respondents' reply to petitioner's London broker was set forth in Stephens' letter to Mather, reading:

"London, 6th February, 1942
W.
Posted 9/2/42.

Messrs. Mather & Co.
226, Walnut Street
Philadelphia, U. S. A.

RECEIVED
HULL
MAR. 9, 1942
DEPT.
MATHER & CO.

Dear Sirs,

Calmar S/S Corporation
Portmar /S/. Hull War Risk Insurance.

We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. has been *diverted to Australia on the outward voyage under Government orders.*

We confirm that all Underwriters on our War Risk Policy have agreed to hold *this diversion* covered pending your further advices. (Italics ours.)

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. Stephens, Director"

HS/OD.

(Ex. 5, R. 593)

It is submitted that the above correspondence can only mean that respondents were not willing to grant *carte blanche* to petitioner, but that they would cover "this diversion", *i. e.*, a diversion *"to Australia on the outward voyage"*, pending further advices. Respondents' agreement was only to cover a changed *round voyage*,—not, as petitioner claims, everything that might have happened up to February 6, 1942, the date of Stephens' letter.

The agreement was entirely in the past tense protecting the petitioner by reinstating its insurance to cover the *Portmar* to Australia on outward voyage. The District Court held that the correspondence constituted an amendment covering the *Portmar* on a round voyage to Australia and back to the United States (R. 744). The petitioner took no exception to the District Court's holding. The Court of Appeals adopted that same construction, referring to "A round voyage from San Francisco to Australia and Philadelphia" (R. 801).

After the Court of Appeals had published its decision, petitioner introduced a new note in its claim with respect to the amendment of the insured voyage. It asserted that an express agreement was made "as of February 6, 1942, extending the policy to cover the vessel *during* its diversion to Australia on the outward voyage under government orders (R. 807). Petitioner now calls it the "special 'held covered' agreement" of February 6, 1942 (*brief, pp.* 8, 14, 15, 28) giving a new name to its repeated, inaccurate characterization of respondents' agreement as one "to hold the vessel covered pending further advices." (*Petition, pp.* 5, 11; *brief on petition, pp.* 23, 24; *brief on argument, pp.* 2, 29, 30, 31).

Respondents did not know (what is now known) that Mather & Company's cable spoke of an accomplished fact that the vessel, as of January 24, 1942, had arrived in Australia, nor that the vessel's cargo had been discharged, sorted and reloaded, nor that the *Portmar* had been taken over for purely military service at Brisbane. Nor was it then known that the vessel had at that time been in Port Darwin and the waters north of Australia since January 19, 1942.

Petitioner argues that, because its London broker's letter was dated February 6, 1942, the policies must be held

to have continued in effect until that date. It continued with an even less valid argument that if the underwriters had refused to hold covered, it would have had a chance to obtain other insurance (R. 811; *brief, p.* 30). It appears on Stephens' letter that it was not received by Mather until March 9, 1942 (R. 593), two weeks *after* the *Portmar* had been shelled and beached at Port Darwin. Respondents did not know, even on January 24, 1942, from Mather's cable, that the *Portmar* was already in Australia and had already departed from the voyage as amended. The date of February 6, 1942, is entirely immaterial.

The cable (Ex. 4) and the letter (Ex. 5) speak for themselves. The respondents' agreement amended the policy "prescribed voyage" to a round voyage to Australia, and did not include new voyages with part new cargo in Northern Australian waters nor side trips out from Australia. It did not modify the policies or any of their terms, conditions or warranties in any other respect.

(d) *Meaning and effect of the "Free of British Capture" rider, marked "B. C. 2".* [Petitioner's Point I (d)]

Petitioner's brief has mentioned the "Free of British Capture" clause under several headings, but appears to have specially stressed it under the heading: "(d) *The declared intent of the parties should control*" (*brief, p.* 31). Respondents are thoroughly in agreement with the validity of that sound principle.

The "Free of British Capture" ("B. C. 2") rider is a single sentence; but, for convenience in discussion, its two clauses may be spaced by separating the first clause, as petitioner did (*brief, p.* 24), as follows:

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising

from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them;

"but unless the insured Vessel is condemned this warranty shall not exclude losses **otherwise covered by this policy** which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

As hereinbefore pointed out (p. 22) the first clause is an unqualified warranty against Allied restraints, and petitioner has not contradicted that proposition. The controversy is limited to the second clause of the rider.

1—*Analysis of the second part of the "B. C. 2" rider.*

Prior to 1940, the "Free of British Capture" clause was an *unqualified* warranty against British capture, etc. as in the warranty in *The Ada* (1925) *supra* pp. 24-26 reading:

"Warranted free from any claim arising from capture, seizure, arrests, restraints, preemptions or detainment of the British Government or their Allies."

The petitioner's own broker testified that the second half of the warranty rider came into use in 1940 by the American Marine Insurance Syndicate (R. 263-265). The 1940 modification of the earlier *unqualified* warranty against British capture, etc. is not discussed in any textbook, and has never

previously come before any Court for decision. So far as concerns this case, the pertinent part reads:

> "but * * * this warranty shall not exclude losses **otherwise covered by this policy** which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, * * *." (Emphasis ours.)

Both Webster's Dictionary (2d Ed. 1936) and The New Century Dictionary (1948) define "otherwise" when used as an adverb, as meaning "in other respects".

The words "losses *otherwise covered by this policy*" mean losses "in other respects" covered by the policy, i.e. losses sustained during the employment of the vessel as a cargo carrier and in some way related to the insured voyage, not losses after the vessel had been completely taken over by the Army and converted into a troop and gun transport and sent out of the insured voyage and into an active war area as part of a military expedition into a country not within the policy limits.

The second half of the rider excepts from the absolute exclusion of the first half of the rider, losses "otherwise covered by this policy", i.e., losses which would be covered by the policy if the vessel were doing what she did do, but not doing it under Government compulsion. It is clear that if there had been no military orders to the master at Darwin, and the petitioner had directed the master to load troops, guns and ammunition at Port Darwin and proceed to Koepang, or if the master had decided to do that on his own initiative, without any Governmental restraint, detention or requisition, such voyage would have been (1) an independent voyage, in no way related to the "insured voyage", (2) a different employment of the vessel, i.e., as a troop transport and not as a commercial vessel, and (3)

an intentional exposure to the risk of enemy attack and, for any one of the above three reasons, as held in the cases cited *infra*, at pp. 61 to 69 of this brief, such voyage would not have been covered by the respondents' policies. The District Court in fact said:

> "That changes in the voyage were made is not disputed; that if these were voluntarily made, the policies in suit would have been avoided, is not challenged" (R. 745).

Respondents agree with petitioner that the *Portmar* was never condemned (*brief, p.* 24). Therefore the phrase "unless the insured Vessel is condemned" may be eliminated from further consideration.

So far, then, as concerns this case, because the damage resulted from gunfire and bombs, the pertinent part of the second clause reads:

> "but * * * this warranty shall not exclude losses *otherwise covered by this policy* which are caused by gunfire * * * bombs * * *" (Emphasis ours).

Petitioner asserts that the losses were "otherwise covered" because gunfire and bombs are within the category of "hostilities or warlike operations" (*brief, p.* 24-5). That assertion is inadequate, because not all warlike operations are covered. The respondents' policies cover the *Portmar* on the specified voyage only, and Judge Hand noted with respect to petitioner's assertion:

> "* * * it overlooks the fundamental subject-matter of the insurance: *i.e.*, the *Portmar* on the prescribed voyage. All provisions of the policy must be read with that limitation in mind; for they were all ancillary and implementary to that purpose" (R. 798).

It is rudimentary that, after any policy terminates, nothing happening thereafter can be "otherwise covered by this policy". *Export S.S. Corp. v. American S. O. M. P. & I. Association,* (1939, 2 Cir.) 106 F. 2d 9; Cert. den. 309 U. S. 686. It follows that when termination of the insured voyage at Brisbane automatically terminated the *Portmar* policies, nothing happening thereafter could be "otherwise covered by this policy".

Petitioner's and the District Court's error lies in their failure to give any effect whatever to the words "otherwise covered by this policy". The District Court, having adopted petitioner's contention, was driven to its logical and astounding conclusion:

> "The rider contains no time or geographic limitations on coverage irrespective of what Great Britain or her allies might do with the vessel. Nor is there imposed any restriction on the nature of the operations in which the vessel might be employed. Under the wording of the rider, the insurance would continue during the seizure, and requisition throughout an entire conflict and on innumerable and perilous voyages or missions over the waters of the world. Indeed, that is broad coverage! Yet, it is what the underwriters elected to cover and to read the rider otherwise is to interpolate limitations they did not choose to write" (R. 750).

According to the petitioner's argument, all that was needed to convert the *Portmar's* voyage policies into *permanent* insurance, regardless of voyage, or nature of employment, was Governmental restraint. On such a construction, there was no need of petitioner's brokers procuring an amendment from Underwriters holding covered the diversion to Australia.

This Court in *Reed* v. *Insurance Company* (1877) 95 U. S. 23 has given highest authority for the principle that a court will not construe language in an insurance policy to mean what would be so unreasonable as to amount to an "absurdity". In that case a marine hull policy covered the vessel from Honolulu via Baker's Island to the United States, and included the clause:

> "The risk to be suspended while vessel is at Baker's Island loading."

The vessel put into Baker's Island for loading, but was lost in a storm at Baker's Island before the loading commenced. The sole issue was whether the suspension of risk clause meant while the vessel was at the island for the purpose of loading or only while actually loading. The Court held that the latter meaning would be so unreasonable as to be absurd, and in affirming a decree for the respondent underwriter, Mr. Justice Bradley said at page 30:

> "A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by

proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the stand-point of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as *indispensable* as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities." (Italics ours.)

After quoting at length from Greenleaf and from Taylor, on Evidence, Mr. Justice Bradley continued at pages 31, 32:

"* * * we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather, or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words 'while vessel is at Baker's Island load-

> ing'. * * * And we think that no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties."

The printed record in that case contains the testimony of four witnesses as to the meaning of the clause as understood in the marine insurance market, and the opinion of the Circuit Court had referred to that testimony. But the Supreme Court in its analysis and decision as to what was intended by the clause in dispute, did not refer to that testimony.

In the case of the *Portmar*, it is submitted, with all deference to the District Court, that an interpretation of the rider to mean that in the event of restraint, detainment or requisition, the insurance continued without "time or geographic limitations," or "any restriction on the nature of the operations in which the vessel might be employed" (R. 750) is not only contrary to the words of the rider, but is so unreasonable as to be untenable.

2. *Application of the "canon contra proferentem".*

Mr. Winter said that to him, as a marine underwriter of long experience, the rider was not ambiguous; and that the second part of the rider applied only "within the framework of that voyage" (R. 248, 251). If, however, in spite of the foregoing analysis, the rider appears ambiguous to this Court, it should, under settled law, be construed against petitioner, because its brokers proposed and actually prepared the policies including in them the American (not British) "Free of British Capture" rider, ("B. C. 2"). It should be noted that Mr. B. K. Ogden of the U. S. Maritime Commission had participated in the adoption of and formulation of the "B. C. 2" rider (R. 674).

> "If an ambiguity cannot otherwise be resolved, the ambiguous provision will be construed against the person responsible for its insertion. The assured may be so responsible, if the ambiguity arises in the slip, which by his agent he has put forward as the basis of the contract of insurance." Arnould on Marine Insurance (13th Ed.) Sec. 75, page 80.

> "The party within the proferentes doctrine is the assured who by his agent brings a slip to Lloyd's underwriters or the underwriters for the company and says: 'This is what I want; how much are you going to charge me?' and then the underwriter fixes the price of what he is going to pay upon the conditions on which he is asked to underwrite the risk." (*A/S Ocean* v. *Black Sea & Baltic General Ins. Co., Ltd.* (1935 C. A.) 51 Lloyd's List Law Rep. 305, at p. 307).

Likewise in *Marine Transit Corporation* v. *Northwestern Fire & Marine Insurance Company* (1933 D. C. E. D. N. Y.), 2 F. Supp. 489, the Court said at page 492:

> "The contract was prepared by brokers acting for the assured, and consequently is not to be most strongly construed against the company."

Despite the special application of the *canon contra proferentem* to an insurer on the clauses which the underwriter inserts in a policy, the principle is not given effect as to phraseology proposed by the assured. *Canton Ins. Office* v. *Independent Transp. Co.* (1914, 9 Cir.) 217 Fed. 213; *Birrell* v. *Dryer* (1884, House of Lords) 9 App. Cas. 345; 5 Asp. M. C. 267; *London Assurance Co.* v. *Thompson* (1902) 170 N. Y. 94.

3. *The Evidence as to the Formulation and Promulgation of the Second Half of the "B. C. 2" Rider, and its Meaning as Understood in the Insurance Market.*

It is always proper, where there is a dispute as to the meaning of a contract provision, for the Court to consider the circumstances of its making, and "all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract". *Williston on Contracts* (1936 Ed.) Sec. 618. That is true whether there is ambiguity or not, and is not restricted to words of art. *Williston on Contracts* (1936 Ed.) Sec. 629; *Restatement of the Law, Contracts,* Sec. 230; *Connecticut Fire Ins. Co.* v. *Davison Chemical Corp.* (1944) 54 F. Supp. 2. Such evidence is appropriate and admissible particularly as to the history of the origin and purpose of the clause. *Metropolitan Exhibition Co.* v. *Ewing* (1890) 42 F. 198.

New insurance clauses have been held specially entitled to such inquiry. In *Calbreath* v. *Gracy* (1805) F. Cas. 2296; 1 Wash. C. C. 219, Washington, J., referring to a new insurance clause said at pages 219, 220:

> "This is a new clause, * * *. To understand it, we must pursue the rule adopted as to the exposition of statutes. We must find out what was the mischief it was intended to remedy, and then the extent of the remedy."

Under the foregoing principle, respondents on the trial introduced original records and testimony from American marine insurance sources showing formulation and promulgation of the 1940 "Free of British Capture" clause and its meaning in the insurance market. Mr. Livingston, Secretary of the American Marine Hull Insurance Syndicate, (comprising about 80 insurance companies R. 229), and Mr. Driver, Secretary of the American Institute of Marine Underwriters, (comprising about 135 marine insurance companies R. 234), produced and identified the original

records and deliberations concerning the several "Free of British Capture" clauses culminating in promulgation of the "B. C. 2" rider, which petitioner's broker appended to the *Portmar* policies (R. 230-1, 235-8).

In October 1939, the American Institute promulgated a "Free of British Capture" clause applicable to *cargo* (R. 241-2, 682), and in July 1940, a later edition (R. 242-3, 683-4), both of which warranted the cargo free of Allied restraints and continued: "but unless the insured property is condemned this warranty shall not exclude losses *otherwise covered by this policy* (or certificate) which occur while the property insured is *on board the overseas vessel* and which are caused by gunfire * * *" (R. 683-4).

In January 1940, the American Syndicate adopted a hull clause *"to cover while being detained for inspection by the British similarly to what has been done with the cargo clause"* (R. 671-2). It is obvious that the cargo phrase: "on board the overseas vessel" could not possibly be used in hull coverage, and was, therefore, omitted. The new clause was adopted January 18, 1940 as an amendment designed "to conform with change made in the same clause of the Cargo War Risk Clauses, which covers while being detained for inspection by the British" (R. 673-5). The minutes of the meeting of the Board of Managers of the American Marine Insurance Syndicate show that present at that meeting was "Mr. B. K. Ogden of the U. S. Maritime Commission" (R. 674), the same person to whom as Director, Division of Insurance, United States Maritime Commission, petitioner's president wrote on November 26, 1941, describing the *Portmar* coverage (R. 598-601). That letter concludes:

> "It is understood that should the voyage of the vessel be altered or changed by the charterer any

additional premiums required by underwriters shall be for the account of the charterer" (R. 601).

And Mr. Ogden approved the premiums on that coverage (R. 602). Yet Government counsel joined petitioner in arguing that "the military expedition" "to reinforce the defense of Koepang" was covered under that very "B. C. 2" clause which Mr. Ogden had known for more than 22 months was intended and declared to cover the vessel only "while being detained for inspection" by the British and their Allies.

Fortunately Mr. William D. Winter was available as a witness. He had participated in framing the "B. C. 2" clause, and testified that the minutes (R. 673) correctly stated the facts (R. 244). Mr. Winter is the outstanding American authority on marine insurance. He has been in that business for more than 49 years, actually underwriting both hull and cargo risks since 1909, an officer since 1917 and presently Chairman of the Board of the Atlantic Mutual Insurance Company. He was for many years one of the managers of the American Marine Insurance Syndicate, a director of the American Institute of Marine Underwriters and sometime president thereof, a director and sometime president of the New York Board of Marine Underwriters, and Chairman of the American Cargo War Risk Reinsurance Exchange from 1939 to 1950. He was also sometime lecturer on marine insurance at Columbia and New York Universities and at the College of the City of New York. He is author of the well-known work on "Marine Insurance", now in its third edition (R. 239-241). He was a disinterested witness (R. 239).

Mr. Winter stated the meaning of the "B. C. 2" clause in the marine insurance business. He testified that the first half of the rider was clearly understood in the insur-

ance world to *exclude absolutely* all Allied restraints (R. 248-250); and that the words, "losses otherwise covered by the policy", in the second part of the rider qualify the complete exclusion in the first part, by letting in *only* such losses as are "within the framework of that voyage" (R. 250-251). In effect, the foregoing makes the words: "otherwise covered by this policy" synonymous with "within the framework of that voyage".

Mr. Grotefend of Mather & Co., petitioner's American broker, testified that he had copied the rider from the Syndicate's form "which had been used on numerous occasions before", and was "currently being used in marine policies written by the Syndicate at the time" (R. 264-5); that he pasted the clause on each policy before sending it to London for respondents' signature (R. 262-4); and that the rider was in use from 1940 to 1945 (R. 265). He heard the testimony of Mr. Winter; but, notwithstanding his forty years insurance experience (R. 262), petitioner's counsel never asked him whether the meaning of the "B. C. 2" clause in the marine insurance business was in any way different from Mr. Winter's testimony or the records produced by Messrs. Livingston and Driver. The evidence of the meaning of the "B. C. 2" rider in the marine insurance business stands uncontradicted and unquestioned.

(e) *Plea of Compulsion* [Petitioner's Point I-(e)].

In its endeavor to perpetuate the error of the District Court that, under *Scott* v. *Thompson* (1805) 1 Bos. & P. 181, the insured voyage could not be terminated without petitioner's *voluntary* consent or approval, petitioner resorts to a discussion of deviation (*brief, Point I (e)*; *pp.* 38-40). In its conclusions of law 7 and 8, the District Court held:

> "The insured voyage was never voluntarily abandoned or terminated by libelant, the *Portmar* or her

master. * * * It was only because of the intervention of a sovereign that the return voyage was not commenced. * * * It was the act of paramount power which prevented the homeward voyage and sent the *Portmar* on to Timor" (R. 746-747).

The District Court's holding that the insurance coverage continued indefinitely cannot be sustained even as to deviations. The District Court quoted from *Scott* v. *Thompson* (1805), 1 Bos. & Pul. 181. In that case an action for sea water damage to goods insured on a neutral vessel from Liverpool to Amsterdam, the vessel, while en route, was boarded by H. M. Brig *Raven* and taken into Falmouth, where she was detained, apparently for examination. On being released, she proceeded immediately for Amsterdam, but en route encountered heavy weather and sprang a leak, causing the cargo damage sued for. The Court held that as the deviation was under compulsion, it did not terminate the insurance. But in that case the voyage was not broken up and terminated by the restraint, and furthermore the damage occurred during the continuance of the insured voyage from Liverpool to Amsterdam, not *during the enforced deviation.* Furthermore in *Scott* v. *Thompson* there was no warranty against restraint as there is in the *Portmar* policies.

The doctrine of *Scott* v. *Thompson* was definitely held *not* to apply to a case where the insured voyage is *terminated* by action of a sovereign government. *Parkin* v. *Tunno* (K. B. 1809) 11 East 22.

In *Anderson* v. *Marten* [1908] A. C. 334, the *marine* hull policy contained the clause "warranted free from capture, seizure and detention, and the consequences of hostilities." The plaintiff's vessel was captured by a Japanese cruiser during the Russo-Japanese War, and ordered into a Japan-

ese port. While so proceeding, she grounded and became a total loss, which was within the named risks. The House of Lords, affirming the Court of Appeal, held that the loss was a loss from capture and that marine underwriters were not liable for loss during the period of capture, even though (but for the capture) the grounding was a marine risk within the policy. Petitioner correctly described the holding of that case in its brief before the Court of Appeals as follows:

> "The stranding which occurred during capture was held uninsured because the policy was warranted free from capture. The loss was related to the capture during which it occurred."

Anderson v. *Marten* was decided by the House of Lords in 1908, two years *after* the British Marine Insurance Act, 1906, had been enacted.

The citations in petitioner's brief (pp. 38-9) are entirely beside the point, because in none of them was the ship taken over for military use, in none was the loss suffered during or because of the diversion, and in none did the policy contain an express warranty against the cause which produced the deviation, excepting only *Aktiebolaget, etc.*, v. *American M. M. Ins. Co.* (*The Ada*) 241 N. Y. 197. *The Ada* policies did contain a warranty against restraint, almost identical with the first part of the "Free of British Capture" rider on the *Portmar* policies, and the Court of Appeals' decision in that case is irreconcilably contrary to the petitioner's contention. *The Ada* is discussed at length (*supra*, pp. 24-26), and is relied on by respondents. It may be repeated here that the New York Court of Appeals, in discussing the clause excluding Allied restraints, said:

> "If . . . the ship at the time it was sunk was proceeding not voluntarily, but under compulsion of

> the British government, by force of its orders and commands, or as a direct consequence of its restraints, then this clause [Free of British Capture clause] does apply, and the insurance companies are not liable" 241 N. Y. 211.

How far afield petitioner's several citations are, will appear from a glance at the reports:

Robinson v. *Marine Ins. Co.* (1806) 2 Johns. (N. Y.) 89:

The schooner *Sukey and Polly* insured from New Orleans to several West Indies ports skipped the first listed port of Cape Nichola Mole to avoid a blockade and headed toward the second named port. On this second leg of insured voyage, she was damaged by bad weather. Chancellor Kent excused the deviation of not calling at the embargoed port.

Post v. *Phoenix Ins. Co.* (1813) 10 Johns. (N. Y.) 79:

The *Radius* put in at St. Antona to avoid British capture, and was there captured by the French. Said Chancellor Kent: "Being a peril insured against, it follows, of course, that the assured is justifiable in a deviation to avoid it; * * *"

Graham v. *Commercial Ins. Co.* (1814) 11 Johns. (N. Y.) 352:

Cargo was insured on the brig *African* from Sweden to St. Petersburg. The brig was held up by bad weather and adverse winds and "stood in for Revel Bay" for shelter from insured risks when she ran aground. The Court said that "if the captain * * * has no other view but to conduct the ship and cargo to the port of destination, the policy still continues."

Burgess v. *Equitable Mar. Ins. Co.* (1878) 126 Mass. 70, 79:

The fishing schooner *Christie Johnstone* ran out of bait, and went to the nearest practical port for more bait. After return to the fishing grounds, she was lost by an insured peril. Said the Court at page 83: "As in the opinion in the Court the trip to St. Peters was a deviation which *discharged* the *insurer,* by the terms of the report there must be judgment for the defendant."

Audenreid v. *Mercantile M. Ins. Co.* (1875) 60 N. Y. 482:

The steamboat *Meteor* was insured against sea perils including fire, from Philadelphia to New York, with liberties to touch and stay. The voyage was interrupted for repair. The repairs were not made necessary by any insured peril or by anything that occurred on the voyage. While lying at Chester under repair, she was destroyed by fire, an insured peril. The "policy was terminated by the interruption of the voyage and the delay at Chester without the assent of the underwriters" (pp. 486-7).

Marfland Ins. Co. v. *LeRoy* (1812) 7 Cranch 26:

Insurance on the ship *John,* from New York to trading on the African coast and return to New York, with liberty to touch at Cape Verde Islands on return for "stock". At Fogo, the vessel took additional cargo not sanctioned by the policy. The trial court left it to the jury to decide whether the breach enhanced the risk. That, this Court held to be error, saying:

> "The discharge of the underwriters from their liability in such cases, depends, not upon any supposed

increase of risk, but wholly on the departure of the insured from the contract of insurance" (p. 30).

Not one of the cited cases sustains petitioner's contention that all diversions are automatically excused, if involuntary. The most that can be predicated on any of the citations is: that compulsory diversions may be overlooked provided the causes are not excluded perils; that they are made to avoid an insured risk; that the diversion is not itself the cause of the loss; and that the diversion does not terminate the "insured" voyage.

(f) *The decision of the House of Lords in Rickards* v. *Forestal Land, etc. Co.* [*1942*] *A. C. 50* [Petitioner's Point I (f)].

The petitioner erroneously asserts that the decision of the Court of Appeals herein is in direct conflict with the *Rickards* case. The decision of the Court of Appeals herein is in complete accord with the decision in the *Rickards* case. They eventuated differently because the coverage and the insured subject differed.

The *Rickards* case involved war risk insurance on British *cargoes* carried on German vessels. On the outbreak of war, under orders of the German Government, the shipmasters abandoned their voyages and attempted to reach Germany. One vessel reached Germany. The other two were scuttled. The policies in the *Rickards* case, however, differed essentially from the *Portmar* coverage; the former insured cargo, not hull, and contained no general "restraint" clause but only an exclusion of voyage frustration. The entire controversy in the *Rickards* case centered only on the frustration clause, which, as the petitioner admits (*brief, p.* 20), is inapplicable in the *Portmar* case.

1. *Cargo coverage differs radically from hull coverage.*

The House of Lords in giving recovery to the assured cargo owners were at great pains to point out an essential distinction between cargo and hull insurance, illustrating why the facts in the *Rickards* case require a recovery as to cargo and a dismissal as to hull.

By Viscount Maughan [1942] A. C. 69, 70-71:

> "* * * in the case of a policy on goods in normal form the owner can claim either for loss of goods or for loss of adventure, while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure."
>
> "* * * It is clear that the position of underwriters in regard to a policy on a ship is entirely different from that of the owner of merchandise. * * * It is now well-settled, contrary to the opinion of LORD MANSFIELD in *Miles* v. *Fletcher* [1779] 1 Doug. (K. B.) 231, that the loss of the voyage has nothing to do with the loss of the ship."

By Lord Wright [1942] A. C. 90:

> "The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. LORD MANSFIELD insisted on applying the same rule to an insurance on a ship, but this view was rejected, and it was said that the loss of the voyage has nothing to do with the loss of the ship. The ship is a vehicle employed in general trading, not wedded to any particular adventure."

The *Rickards* decision is thoroughly in accord with the American law on the subject. In *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 378, this Court pointed out that, contrary to insurance on *cargo* for a voyage, insurance on a

vessel for a voyage does not insure completion of the insured voyage. Story, J., said at page 401:

> "This was expressly held by this Court, in the case of *Alexander* v. *The Baltimore Insurance Company*, 4 Cranch R. 370, where it was decided that an insurance on a ship for a voyage, was not to be treated as an insurance on the ship *and* the voyage, or as an undertaking *that she shall actually perform the voyage;* and, only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, *during* the voyage" (Italics ours).

Arnould "Marine Insurance" [13th Ed.], at the end of Sec. 1104, states that the foregoing statement of law as to *hull* insurance is the established law of both England and the United States. Petitioner has now conceded that principle (*brief, p.* 20).

Accordingly, because of the policy exclusion of frustration of voyage, the cargo assureds in the *Rickards* case could not recover on the ground of termination of the voyage short of its destination. But those same cargo assureds did recover on the other incident of cargo coverage, to wit: the loss of the cargo itself caused by an insured peril, namely: Enemy "restraint". Lord Porter pointed out that, when the insured voyage came to an end, cargo underwriters were still liable for all the damage that followed in the wake of German seizure. That is definitely the law of the United States. *The Llama,* 267 U. S. 76; *Muller* v. *Globe & R. F. Ins. Co.,* 246 F. 759. As to hull coverage, when the voyage ends, the coverage ends. There was no liability of hull underwriters which could survive termination of the voyage, because the *Portmar* damage was occasioned by enemy attack which occurred after the voyage was broken up.

2. *The* Rickards *policies contained no general "restraint" clause.*

Each of the *Portmar* policies contained an absolute exemption from restraints by the Allied Governments, in the first part of the "Free of British Capture" rider (R. 714-5), whereas the *Rickards* policies contained no such exclusion of restraints by the German Government. The sole basis for recovery in the *Rickards* case was the loss of cargo caused by seizure, capture, restraint, etc. of the German Government [1942] A. C. 111. Petitioner has not denied or questioned the validity of that general exclusion, and Judge Hand's opinion confirmed its effect as an absolute exclusion (R. 797-8). If there had not been an absolute exclusion, and respondents had been liable for Allied restraints, there would have been no need to amend the limits of the voyage originally insured to substitute Australia for the Philippines. Under those circumstances, as declared in *The Llama* (267 U. S. 76) respondents would have been liable for consequences of restraints, etc. after the *Portmar* sailed from Suva for Australia.

The opinions in the *Rickards* cases both in the King's Bench Court of Appeal, [1941] 1 K. B. 225, and in the House of Lords [1942] A. C. 50, indicate how futile the *cargo* insurance would have been if German restraints had been entirely excluded from the coverage. Petitioner has stressed that point and quoted language of the British courts to add further emphasis (brief, footnote p. 42); and respondents do not dispute a syllable of those opinions as applied to the facts in the *Rickards* cases. What petitioner has failed to mention is that the *Rickards* insurance related to cargo completely in German custody and utterly beyond any control by the assureds and covered against German restraints. If German restraints had been excluded entirely,

there would have been no basis for liability in the *Rickards* decision.

In our case, as both the District Court (R. 744) and the Court of Appeals (R. 793-4) noted, the Allied restraint, which was imposed when the *Portmar* arrived at Suva, did not terminate the coverage at that point because the prescribed voyage was amended to substitute "Australia" for the "Philippines". It was only when through Allied restraints the return voyage became impracticable at and after arrival at Brisbane, that the prescribed voyage and the policies were terminated.

At the top of page 43 of its brief, petitioner has attempted to brush off the vital distinctions between the *Rickards* case and the *Portmar*, by asserting that safety of the subject-matter was prime in both cargo and hull insurance. It is only losses within the accepted risks that underwriters are concerned with. The liability for German restraints (except frustration) was the basis for recovery in the *Rickards* case, whereas the *exclusion* of Allied restraints in the *Portmar* policies preclude respondents' liability.

The *Rickards* policies covered the loss by eventual scuttling of two German vessels and the loss by seizure of the cargo of the third on arrival in Germany, [1942] A. C. 111, because German restraints, excepting only frustration, were among the insured risks. Those restraints had become operative before the voyages had been broken up, and all loss that followed upon the restraint was within that coverage. *The Llama* (1925) 267 U. S. 76; *Muller* v. *Globe & R. F. Ins. Co.* (1917, 2 Cir.) 246 Fed. 759; *Anderson* v. *Marten* [1908] A. C. 334.

It is obvious that the decision in *Rickards* v. *Forestal* [1942] A. C. 50, has nothing in common with the present controversy.

3. *The* Rickards *decision sustains respondents' position.*

So far as the *Rickards* decision touches upon the circumstances of the present controversy, it definitely supports respondents' position and is in complete harmony with Judge Learned Hand's opinion in the Court of Appeals.

By Lord Porter:

> "It is true that a loss which occurs after the insured voyage (whatever it may be) is terminated, is irrecoverable, * * *" [1942] A. C. 106.
>
> "At sometime, each of the masters abandoned the insured voyage and set his vessel's course for Germany or the bottom of the sea according to circumstances. At that moment the insured voyage came to an end, * * * [1942] A. C. 110.

but underwriters in the *Rickards* cases continued liable for the eventual loss of the cargo even though it resulted from the same enemy restraints which frustrated the voyage, *because only frustration was excluded.* That resulted from the terms of the insurance, whereby the *Rickards* policies did *not* exclude *all* consequences of German restraints (but only frustration of the voyage) whereas the *Portmar* policies did exclude *all* Allied restraints.

The decision of the Court of Appeals in the *Portmar* is completely in harmony with all the decisions on the subject both of this Court and of the House of Lords.

g—*Increased Risks.* [Petitioner's Point I-(g).]

Petitioner in section (g) of its First Point (p. 44) has feigned that the Court of Appeals referred to the diversion to Australia when it mentioned the increased risks following the restraint at and after Brisbane, and that the "prescribed

voyage" still remained the originally-insured voyage to the Philippines. The Court below made its meaning perfectly clear that it was referring to the round voyage, as amended by the agreement to hold this diversion to Australia covered, namely: "from San Francisco to Australia and Philadelphia" (R. 801). The originally-insured voyage was broken up when the *Portmar* was sent to Suva, and (as petitioner said of the insurance, R. 811) "by express agreement it was continued, or reinstated." Again: "Thus the war risk insurance involved here consisted of the original policies and the special 'Held Covered' agreement of February 6, 1942" (*brief, p.* 8).

The tremendous increase of risk, when the vessel was sent from Brisbane to waters north of Australia, was too obvious to admit of argument. What might or might not have been involved if the voyage to the Philippines had not been amended is entirely beside the point, and completely irrelevant and immaterial to the merits of the present controversy.

B. Answering Petitioner's Second Point—Frustration of the *Portmar's* insured voyage.

In its petition and brief on application for a writ of certiorari, and in the entire Second Point of its present brief (pp. 45-52), as well as its summary (pp. 16-17), petitioner has sought to engraft upon the insurance policies the provisions of its charter party with the Government. The petitioner concedes that the policies do not refer to the charter, nor were respondents a party to it (*brief, pp.* 17, 21; R. 18-38). The burden of petitioner's second point is:

> "The voyage of the *Portmar* was not frustrated because the provisions of the *charter* * * * explicitly

> anticipated and provided for the effect of any deviation or restraint * * *" (*brief*, pp. 16-17).
>
> "The parties to the charter, viz., petitioner and the United States Maritime Commission, treated the voyage and the charter as continuing in effect until information was received as to the extent of the disaster" (*brief*, p. 17).

and its case against the declared break-up of the voyage is predicated not at all on the *insured* voyage but exclusively on the *charter* voyage.

The charter party is *res inter alios acta* and its terms and provisions cannot in any way affect the entirely distinct and unrelated insurance contracts. *Fresh* v. *Gilson* (1842) 16 Pet. 327, 332; *American D. Corp.* v. *Dirigold M. Corp.* (1942, 6 Cir), 125 F. 2d 446, 452. No departure from the agreement contained in the policies can be affected by petitioner's relations with third persons without respondents' consent. In a case involving a charter party, this Court said:

> "* * * the contract related to a particular ship just as it related to a particular voyage. Neither could be changed without departing from the contract, which could not be done without the consent of both parties." *Texas Company* v. *Hogarth S. Co.* (1921), 256 U. S. 619, 627.

All cases involving frustration concern specific contracts or undertakings, which have been thwarted. If the Government charter had authorized or required that the *Portmar* proceed to Murmansk under its charter party, could that operate to extend the insurance contract to cover such a diversion? To ask the question is to answer it. Judge Hand referred to

> "* * * the fundamental subject-matter of the insurance: *i.e.*, the *Portmar* on the prescribed voyage. All

> provisions of the policy must be read with that limitation in mind; for they were all ancillary and implementary to that purpose" (R. 798).

Whether the *chartered* voyage was frustrated or not is utterly immaterial, only the *insured* voyage is material so far as respondents and their policies are concerned. Petitioner has seized upon an obvious typographical oversight in Judge Hand's opinion, just as did the Solicitor General's brief as *amicus curiae* supporting the petition for the writ (*footnote*, p. 3), namely: "A policy, upon a voyage *charter* must be understood to be coextensive with the insured voyage, * * *" (R. 801; 197 F. 2d 801). The word "charter" should obviously be deleted; for there was no policy on the voyage charter, the charter was not at all involved in the present insurance controversy, the petitioner well understood the true import of the passage in its petition for rehearing, *viz:*

> "It may be granted that the policy on the *Portmar* 'must be understood to be coextensive with the voyage,' * * *" (R. 814)

and the reasoning in the opinion shows beyond cavil that the principle Judge Hand invoked was that *hull voyage policies are co-extensive with the insured voyage.*

There can be little doubt that petitioner could find no basis upon which to even cast doubt upon the Court of Appeals holding that the *insured* voyage was broken up at Brisbane between January 5 and 9, 1942. That left for argument only the thoroughly untenable contention that—somehow or other—arrangements with the Government as charterer should completely govern respondents' liability under the insurance policies.

The entire argument, specifically, Petitioner's Second Point, is utterly without merit.

THIRD POINT.

Even if the break-up of the *Portmar's* voyage had not terminated the policies at Brisbane, as held by the Court of Appeals, (1) employment of the *Portmar* as a military vessel, (2) her independent voyage for Timor, and (3) her deliberate exposure in the waters north of Australia to expected enemy attack, preclude any recovery by Petitioner against Respondents.

Petitioner has throughout the present litigation attempted to excuse breaches of the policy terms and conditions by claiming (what is factually correct but immaterial) that the Government compelled performance of the acts which constituted those breaches of the insurance contract. As shown at pages 22 to 27 of this brief, the first half of the "Free of British Capture" rider constituted an express warranty excluding such restraints. In *Dole* v. *New England M. M. Ins. Co.* (1864) F. Cas. 3, 966; 2 Cliff. 394, 415, the Court states with regard to such warranties:

> "The legal construction of the clause is that the underwriter is liable for the direct effects of the perils insured against, while the assured stipulates to bear the direct effect of those perils which are excepted."

The petitioner's plea of compulsion has been fully discussed at pages 45 to 50 of this brief. The circumstance is mentioned at this point because petitioner (*brief, pp.* 67-71) has already made its claim clear that Governmental "restraints" rendered all the *Portmar's* movements involuntary, and for that reason only, respondents are asserted to be liable for the consequences of those excepted risks.

There is no question that the three policies issued by the several respondents on the *Portmar* against war risks covered a commercial round-trip voyage on a merchant vessel. The *Portmar* was a registered vessel, she was listed in Lloyd's register as a merchant vessel, she was described in the libel as "a single screw ocean cargo steamship", she had never been used as anything other than a cargo vessel since the petifioner acquired her, in 1930, and she was entirely unarmed (R. 46, 129, 160, 580). Constant references in the policies themselves, such as "cargo", "trade", "general average"—are all applicable only to a merchantman on a commercial voyage. When Messrs. Mather's cable and Stephens' reply changed the originally-insured voyage to a round-trip voyage to Australia and return to United States the voyage thus prescribed, of course, continued as a commercial voyage under the insurance (R. 586, 593). There is nothing in the record which would justify any claim that the voyage which respondents insured was ever anything but a commercial voyage.

To be sure, relations with Japan were strained on November 27, 1941 when the insurance was effected. Petitioner (*brief, p.* 36) as well as the District Court (R. 751) both took notice of those conditions and both equally failed to note that under those circumstances petitioner deliberately asked for insurance coverage which exempted Underwriters from Government requisitions, restraints, etc. Petitioner has not asserted that the insurance was anything but insurance on a vessel for a commercial voyage. Its claim has been directed to the assertion that without regard to that circumstance the facts which broke up the commercial voyage and changed the status of the vessel without respondents' consent were compulsory and involuntary on petitioner's part.

Even if it should be held that the *Portmar's* "insured round voyage" was not terminated at Brisbane when the Army took complete control and sent her north more than 2,000 miles in the direction of impending invasion, it was certainly terminated at the latest when, after discharge at Wyndham on February 8, 1942, of all her cargo including what had been added in Australia, she returned "light" to Port Darwin, and loaded troops, field guns and ammunition for Koepang.

A. Employment of the *Portmar* as a military vessel.

The radical change in the character of the use of the *Portmar* from merchantman to a military unit and her continued employment as a military unit in an active war area, "added so notably to the risks of the prescribed voyage that the voyage ceased to be the same" (R. 801).

In *Canton Ins. Office, Ltd.* v. *Independent Transp. Co.* (1914, 9 Cir.) 217 Fed. 213, the steamer *Vashon* was insured in July 1907 for a term of one year, as a general passenger and freighting vessel on Puget Sound. About a month later (August) she was retired from that service. Four months later (December) the *Vashon* was anchored in a river. Subsequently but before expiration of the one-year term, without any known cause she filled with water and sank at her moorings. In the suit brought to recover against Underwriters, the Court in denying a recovery, said:

> "We do not say that a vessel insured as being employed in navigation may not suspend navigation for a time, or lay up at a dock, but that is a different thing from going out of commission for a period of months."

The authority of the above decision is not affected by the fact that the insurance was under a time policy warranty. The Court quoted with approval Lord Watson's opinion in the House of Lords in *Birrell* v. *Dryer* [1884] 9 App. Cas. 345; 5 Asp. M. C. 267:

> "To define the limits within which the vessel is to be navigated for the purpose of a time policy is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy."

See:

Arnould on Marine Insurance (13th Ed.), Sec. 436.

In *Andrews* v. *Essex F. & M. Ins. Co.* (1822) F. Cas. 374; 3 Mason 6, Judge Story discussed insurance on a voyage which turned out to be illicit trading,—entirely without intention on the part of the insured,—and said at page 17:

> "It is perfectly settled that the underwriters, by the general terms of the policy, are not liable for any loss arising from foreign illicit trade, unless the policy be underwritten with the full knowledge on their part that such was the object of the voyage."

and at page 23:

> "The chance of illicit trade is never assumed, unless it is clearly intended to be carried on."

In *Hermann, Briggs & Co.* v. *Western M. & F. Ins. Co.* (1839), 13 La. 516, the Louisiana Supreme Court denied recovery from marine underwriters where a cargo-passenger vessel was lost, because at the time of loss she was being used temporarily as a tow boat, which use increased the risk to the insured vessel.

The employment of the *Portmar* as a warship was farthest from the minds of petitioner and respondents. It increased, beyond measure, the risk of loss or damage from enemy attack. Under the above authorities it was clearly not within the coverage of the policies.

B. The *Portmar's* independent voyage to Timor.

The employment of the *Portmar* as a troop ship from Port Darwin bound for Koepang was on an independent voyage in no way related to the "insured voyage," was not undertaken for the safety of the *Portmar*, did not in any wise promote the purposes of the "insured voyage" and was clearly not within the meaning and intent of the parties to the insurance contract. That diversion, therefore, could not under any circumstances be regarded as covered by the policies.

In *Snyder* v. *Atlantic Mut. Ins. Co.* (1884), 95 N. Y. 196, the Court said at page 205:

> "Whatever contention may arise over other questions in the case, it cannot, we think, be questioned that a vessel which leaves the port of her departure in pursuit of the insured voyage, without intention of returning, has commenced her voyage in such a sense as to be protected by a policy of insurance, covering her from perils during such voyage, and that *an independent voyage undertaken by her, after such a departure, causes a forfeiture of her insurance.*" (Italics ours.)

In *Seccomb* v. *Provincial Ins. Co.* (1865), 92 Mass. 305, a vessel was insured on a round voyage from New York to Buenos Aires and Monteyideo and return, with liberty to go to port or ports in Europe. After reaching Rio de Janeiro, she proceeded to Malta and Constantinople, and there

entered into a French charter for a round trip to the Crimea and return to Constantinople. After completing that side trip, she sailed to Smyrna and then to Boston, and was lost en route. The Court gave judgment for the underwriter on the express ground that the independent voyage starting at Constantinople terminated the insurance. The Court said at pages 310, 311:

> "Certainly it is inconsistent with any fair and reasonable interpretation of the clauses in question to hold that they embrace, *ex vi termini*, a right to make distinct, separate and independent voyages, having no connection with the general objects and purposes of the voyage, either outward or homeward, named in the policies, but undertaken as new and intermediate voyages, having no reference to the accomplishment of the ultimate destination of the vessel or her port of discharge. Such an interpretation would convert a voyage policy, limited in the extent and duration of the risk insured to a particular adventure or enterprise, *into a contract of insurance for an unlimited period of time, and upon risks the nature and extent of which neither of the parties to the contract could know or foresee.*" (Italics ours.)

Arnould on Marine Insurance (XIII Ed., 1950) discussing policy clauses giving liberty to touch and stay at ports, says in Section 406 at page 400:

> "Intermediate Voyages.
> 406. In like manner, although the words of the clause are of the most extensive nature, the ship will not be protected by such a policy if, at the time of loss, she be on an intermediate voyage, not subordinate to or connected with the voyage or voyages contemplated by the parties as the principal objects of the contract (unless sanctioned by a well-established usage)."

When the *Portmar* sailed February 15, 1942, for Koepang, she entered on an "independent voyage" in no way connected with the insured round trip voyage. Even if it be held that the respondents' insurance had not already terminated, nevertheless under the authorities above quoted, whatever insurance covered the vessel when she began loading troops, guns, etc. for Koepang, was at that moment at the very latest, terminated. The policies terminated without regard to causal connection.

C. Deliberate exposure of the *Portmar* to the risks in Northern Australian waters where enemy attack was momentarily expected.

Insurance against risks *specified* in a marine insurance policy does not cover loss from those specified risks if the vessel is intentionally or recklessly exposed to those risks.

From Sydney, where the *Portmar* arrived December 30, 1941, she was sent north to Brisbane, 529 nautical miles, then north to Port Darwin, a further 2,097 nautical miles, then west to Wyndham, 286 nautical miles, through waters controlled by the Japanese into the face of almost certain attack. Proof of the imminence of Japanese attack is set forth at pages 8 to 13 of this brief.

From Brisbane on, the *Portmar* steamed right back into the very waters, the dangers of which had necessitated her original diversion to *southern* Australia for safety.

The law that risks to which a vessel is *intentionally* exposed are not covered, even though specified in the policy, has been laid down in cases where the loss was caused by intentional exposure to "capture," to "collision" with ice, and to "perils of the sea."

In *Cleveland* v. *The Union Insurance Company* (1811) 8 Mass. 308, the defendant's marine time policy gave the plaintiff's vessel world-wide trading liberty and covered

her against all the usual perils, including "capture and detention of princes" (308, 309). At Isle of France the vessel obtained a cargo for Bombay, but the ship's register showing her ownership and neutrality, her cargo manifest and her Mediterranean passport were left behind at Isle of France. On that voyage she was captured by a British frigate, taken into Colombo, Ceylon, and there condemned by a Prize Court because of her lack of papers proving her neutrality. The Supreme Court of Massachusetts reversed a verdict for the plaintiff assured, on the ground that the risk of "capture" had been unnecessarily incurred through lack of ship's papers.

The same law as to intentional exposure to risk was laid down by Mr. Justice Story in *Haven* v. *Holland* (1820) (C. C. 1st C.) 2 Mason 230; Fed. Cas. 6,229, a suit by cargo owners against their underwriter for loss of the cargo by capture. The carrying vessel, the *Volant,* was a commercial vessel, but held a commission and letter of marque, which fact was known to the underwriter. The *Volant* was captured and condemned as prize together with her cargo. The question was whether she was captured as the result of her having herself gone out of her way to make a capture. That question was left to the jury; but Story, J., in his charge to the jury said at page 232:

> "It is clear from the authorities, that a vessel insured as a letter of marque has no right to cruise at large for prizes."

In *Newton Creek Towing Company* v. *Aetna Insurance Company* (1900), 163 N. Y. 114, the owner of a tug sued its liability underwriters on a policy of marine insurance which indemnified the plaintiff against its liability to others for loss or damage to any other vessel caused by collision for which the tug or the plaintiff might be legally liable.

The Court found that the plaintiff's tug had intentionally *forced its tow* through an ice floe, and held that the resultant *damage to the tow* was, therefore, not covered by "collision" within the meaning and intent of the policy.

In affirming judgment for the defendant, Parker, C. J., said at page 116:

> "* * * when the master of the vessel insured designedly takes the chance of running into a perfectly apparent obstruction, *although with the hope and expectation that the vessel will successfully meet the encounter*, the contact is not a collision within the meaning of the term as employed in this contract." (Italics ours.)

Newtown Creek Towing Co. v. *Aetna Insurance Co.* was cited by the Federal District Court in *Mellon* v. *Federal Insurance Co.* (1926 D. C. S. D. N. Y.), 14 F. 2d. 997, and although held inapplicable to the facts of a vessel's boiler explosion, the Court did not question the correctness of the holding in the *Newtown Creek Towing Company* case. Judge Augustus N. Hand summarized the holding of the *Newtown* case at page 1002:

> "The vessel was *purposely* taken through an ice field in the hope that she would not suffer injury, *and did not merely come in contact unexpectedly* with floating cakes of ice. Such an impact was held not to be within the nautical definition of a collision." (Italics ours.)

In *Standard Marine Insurance Co., Limited* v. *Nome Beach Lighterage & Transportation Co.* (1904 C. C. A. 9 C), 133 Fed. 636, an action by insured cargo owner against its underwriters for damage to cargo from perils of the sea, the plaintiff was also owner of the carrying vessel, and the master forced the vessel through ice in Alaskan waters in order to arrive at destination, Nome, by an early date.

The Court held that damage caused by pushing a vessel through ice is not a loss by perils of the sea within a policy insuring against "perils of the sea" (p. 647). A provision of the California Civil Code, which was made a part of the policy, provided "an insurer is not liable for a loss caused by the willful act of the insured," but the Court held that that provision was *declaratory of the general principle of law* (p. 651). *Certiorari* was denied in 200 U. S. 616.

To the same effect is *Williams* v. *New England Mutual Marine Insurance Company* (1869 C. C. D. Mass.), 3 Clif. 244, a decision by Supreme Court Justice Clifford, sitting on circuit. That was an action by the owner of the steamship *New York* against her marine hull underwriters to recover for a total loss of the vessel, while under charter to the War Department of the Government as a Government transport, and like the *Portmar* in charge of her owner's master. She was loaded by the Government as charterer with ordnance stores, and her master was ordered by the Army to proceed to Hatteras Inlet, there to take a pilot and proceed across the bar, for delivery of her cargo to the Union troops. In carrying out the *Government's* order, she struck on the bar and became a total loss (p. 247). Mr. Justice Clifford held at pages 248-250, that "the attempt to cross the bar was an unjustifiable, rash and hazardous act of navigation which no prudent or skillful navigator would have undertaken"; and that, therefore, the hull underwriters were not liable to the plaintiff, although the master would not have made the attempt except for the *compulsory order* of the Government.

The intentional exposure of the vessel to a risk named in the policies in the above cases pales out when compared with the intentional exposure of the *Portmar* to the risk of enemy bombing all the way from Brisbane on. In *Haven*

v. *Holland* and in *Williams* v. *New England Mutual Insurance Co.*, the plaintiff (the insured) had no part in the intentional exposure of his property, and in the latter case the compulsion was a Government order. It is immaterial whether the intentional exposure of the *Portmar* was by the petitioner or by the sovereign Government of the United States.

FOURTH POINT.

The *Portmar* was never a constructive total loss, and petitioner's attempted abandonment on April 8, 1942 was invalid.

The Court of Appeals specifically omitted analyzing the alleged Constructive Total Loss because it considered its decision on termination of the policies conclusive of all issues (R. 793). Petitioner has utterly failed to sustain the proposition that the *Portmar* was ever a constructive total loss or effectively abandoned, for: (1) its exaggerated expense claims are fantastic, (2) its claims involve attempted expungement of express policy covenant, and (3) its claims tend to defeat respondents' subrogation even as to "just compensation" from the Government for the requisition of title to the *Portmar*.

A. Petitioner's claim of constructive total loss is based on gross exaggerations.

Petitioner, faced with the necessity of finding an expense total exceeding $860,000 the insured value, argues for such a "*number*" not based on fact, which carries far beyond even the realm of speculation, into the fantastic. The following appears from the record and from petitioner's brief (p. 59):

	Petitioner's Claim	Proven Expense
Salvage	$487,500.00	$ 20,008.59
Towage to Brisbane	55,130.00	55,130.00
Expense of Full Repair	390,000.00	91,000.00
Totals	$932,630.00	$166,138.59

Such incredible disparities, especially on salvage, demand analysis, the more so because nineteen months after the Master's return to New York, petitioner in its libel stated the all inclusive total expense as $250,000 (R. 68-9).

a. Salvage.

(1) *Notice of abandonment having been given April 8, 1942, salvage cannot be included in the expense of recovery and repair.*

It is unquestioned American law that the actual facts existing **at the time of the abandonment** determine the right to abandon to underwriters. Petitioner recognized the principle (*brief, p.* 57-8), but proceeded immediately to include two salvage claims of $325,000 and $162,500 aggregating $487,500, *i.e.*, more than half its asserted expense total, which under the cases **can not be included** to establish a constructive total loss. *Church* v. *Marine Ins. Co.* (1817) F. Cas. 2711; 1 Mason 341, 343; *Humphreys* v. *Union Ins. Co.* (1824) F. Cas. 6871; 3 Mason 429.

In *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.* (1916) 236 F. 618, involving a vessel *recovered by strangers before abandonment,* the Ninth Circuit said at pages 635-6:

> "The rule has relation to the high probability of a total loss of the property existing at the time the notice of abandonment is given, and not to the time the vessel was abandoned by the officers and crew on October 13th. * * * The vessel was rescued and towed into Astoria, October 15 * * *. The right of the appellee to abandon the vessel, if such right

> existed, must therefore be determined by the situation of the vessel and the conditions existing on Monday, October 16th, when the written notice of abandonment was given to the agent of appellant. At that time the vessel was afloat and riding safely at anchor * * *".

Similarly, when notice of abandonment of the *Portmar* was given on April 8, 1942 (R. 587-8), the vessel was afloat at Port Darwin (R. 733). Whether the *Portmar* could be floated, whether pumps or private salvors could be procured—those and related uncertainties had all been resolved and removed **before** the abandonment. They were no longer circumstances entitled to consideration under the "high probability" rule. *Under that rule* Captain Williams' lien for having raised the *Portmar* could not be considered in arriving at a figure that would constitute a constructive total loss.

Even if petitioner's fantastic salvage figures had been within reason, they would still have no place under the "high probability" rule.

(2) *Petitioner's fantastic salvage figures.*

Even if salvage services rendered prior to abandonment could be included as an expense, petitioner's figures are not entitled to any weight whatever. The salvage figures are the two *claims* for the **identical services**, £100,000 made by the Australian Salvage Board and £50,000 made by Captain Williams the private salvor (R. 692, 694-5). The Salvage Board described its claim as salvage with suitable assistance including towage to Brisbane (R. 634). That identical demand was specifically included in the stipulated $55,139 as "services and equipment * * * in raising her and taking her from Port Darwin to Brisbane" (R. 223). The Australian High Court's total award of

£5,000, *i.e.*, $20,008.59, was decreed to Captain Williams and his private company (R. 694-8). *The foregoing evidence completely disposes of the* (*£100,000*) *claim*—equivalent to $325,000.

The salved value was agreed to be £158,000 (R. 685), *i.e.*, $513,500. Petitioner's salvage figures (*brief, p.* 59) aggregate $487,500 equal to a salvage award of 93½%, where the material at risk was of trifling value (R. 697). The United States Government (R. 622) and petitioner (R. 64) both knew that the salvage demands were excessive. The master reported: "* * * to refloat the ship was no great feat in itself" (R. 610) and he, the chief engineer and the chief mate were all "of one opinion that it would not take much to raise her" (R. 425). The Australian High Court awarded £5,000 on the £150,000 salved value—just over 3%, including disbursements. Petitioner's proposed figure of $487,500 for salvage was and is utterly preposterous and far short of even the *slightest probability.*

This Court in *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 378, affirmed the Circuit Court's disallowance of an abandonment under the 50% ("high probability") rule although the "first figure" of the salvage demand was 50% in addition to extensive repair. In the case of the *Portmar* the Australian salvage decree fixed the salvage expense at $20,008.59 (R. 597), and no larger figure can be considered.

b. Towage to Brisbane.

When petitioner was unable to prove the expense of towage from Darwin to Brisbane, respondents stipulated with petitioner:

> "* * * the reasonable cost of the services and equipment furnished the *Portmar* by Commonwealth Salvage Board in raising her and getting her from Port Darwin to Brisbane was $55,130" (R. 223).

Petitioner now violates the stipulation by asserting that no wages, overhead or profits were included (*brief, p.* 59). The record and the stipulation are to the contrary showing that the $55,130 covered the Salvage Board £100,000 claim (R. 634) including wages and material, without any credit or allowance for the "pay load" of salt hides transported in No. 1 hold and coal in No. 2 hold from Darwin to Brisbane (R. 638, 644). Some of the items were duplicated in the cargo salvage claim (R. 698). The parties' stipulation is not a spring-board for further speculations and assumptions. *The Cockatoo* (1932, 2 Cir.) 61 F. 2d 889. The agreed "reasonable" towage and incidental expense, $55,130, is all-inclusive *as stipulated.*

c. Expense of Repair.

As early as May 26, 1942, while the *Portmar* was still at Darwin, petitioner's president planned a joint survey when the *Portmar* should arrive at Sydney (R. 617), and on October 24, 1942 the general counsel of the War Shipping Administration and petitioner's president planned a joint

> "full survey of the damage to the vessel • • • and of cost of repairing such damage so as to restore her to the condition at which she was at the time of her bombing. This survey, of course, shall be without prejudice as to whether the condition of the vessel at the time of bombing met the requirements of full classification" (R. 622-3).

All concerned parties were represented on that formal written survey (R. 65) which declared:

> "The cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February 1942 would amount to approximately £28,000" (R. 651).

equivalent to $91,000 (R. 65). That joint survey report, not having been impeached, establishes the facts therein recited. *The Elmer A. Keeler* (1912, 2 Cir.) 194 F. 339, 341; *The Mason* (1918, 2 Cir.) 249 F. 718.

When it came to suit, petitioner produced an *ex parte* "owner's" classification survey (R. 642-9); in which *non-war-risk* items were included, *i.e.*, wear and tear such as worn out "cylinders and so forth" (R. 202). Neither in that report nor in the related letters was any separation of war damage items even mentioned (R. 629-631; 641-9) —a circumstance which was pointed out before the joint survey was held (R. 622-3). It was clearly understood on the trial that respondents withheld objection to the admission in evidence of the *ex parte* survey but were not to be bound by it (R. 173; 205-6). Only the fact that an *ex parte* survey had been made is in evidence, and not the statements therein. *Watson* v. *Insurance Co.* (1808) F. Cas. 17284; 2 Wash. C. C. 152; *Abbott* v. *Sebor* (1802) 3 Johns. Cas. (N. Y.) 39, 46-7; *Pennsylvania* v. *Downer* (1926, 2 Cir.) 11 F. 2d 466; *The Westchester* (1918, 2 Cir.) 254 F. 576.

Petitioner now complains that the joint survey, planned by it for the specific purpose of ascertaining the repair expense, in which it requested respondents to join, should be ignored for reasons based on assumptions and court colloquies but not on evidence (*brief, p.* 61). If the joint survey report was a hoax, why did not petitioner—with its *ex parte* survey in its hands—take prompt action in 1943 to correct any errors, instead of on the trial in 1951 when there could be no verification? Why did petitioner request respondents to join a survey which it urges now "is entitled to no weight whatever" because too remote in time? (*brief, p.* 61). The trial judge criticised the joint

survey because no "tenders" were sought and no specifications prepared (R. 739). That same criticism is equally applicable to the *ex parte* reports. Since there was agreement on the amount in the joint survey, there was no need of "tenders" or specifications. Whether the repairs were ever made or not is entirely immaterial. The formal joint survey finding ($91,000 for all repairs) is the only evidence of the expense of repair in the record.

Petitioner cites the "judgment" of the master and chief officer as to the possibility of salvage and the expense of recovery and repair. There is ample evidence of the master's competence and bravery, but his only qualifications in the record as a surveyor are

> "The main items, structural damage to her hull and damage to engine, boilers and auxiliaries, * * * Of the first you cannot on account of oil and dirt see anything to speak of yet * * * Of the second I do not feel competent to speak" (R. 638).

The chief mate's qualifications as a surveyor were:

> "* * * what little bit I know about it of the cost of shipyard repairs and cleaning ships and such as that * * *" (R. 507).

and, after return to the United States, the master announced *for the first time,* his "judgment" at "several times the value of the vessel" (R. 357-8). That sum would amount to at least twice $688,000. (R. 179) or $1,376,000. a figure hopelessly out of line. Because of petitioner's distorted picture, respondents are compelled to refer to other realities. The master never weighed at Darwin whether the *Portmar* was worth raising (R. 425), was not sure what his opinion was on March 3, changed his mind quite often, and thought the *Portmar* worth repairing except for war conditions and her position (R. 536-7). He never mentioned

salvage to the expert Williams at Darwin (R. 424), whom he saw almost daily on the *Portmar* from February 24 to March 2 (R. 729). He was not interested (R. 437), he never tried to get a survey at Darwin (R. 421) and his *only* written report *prior* to the salvage was: "EXCESSIVE DAMAGE MAKES SALVAGE IMPOSSIBLE" (R. 604). His formal protests contained not a word on the subject.

When he testified in 1945, he had to offer some justification—hence his "judgment". The vital test of "a considerate owner uninsured" (*Bradlie* v. *Maryland*, 12 Pet. 378, 398; *The Tornado*, 2 F. 2d 137, 141) the master utterly failed to meet.

B. The policy covenant.

The foregoing is the very sort of fantastic exaggeration the policy constructive total loss covenant was designed to obviate:

> "No recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the insured vessel shall exceed the insured value" (R. 71).

By the fourth paragraph of the "War Risk Clauses" (R. 71) the foregoing covenant was to apply only to claims arising from *physical damage* to the vessel. The *Portmar* claim arose entirely from physical damage. The cable instructions to Stephens "GIVE NOTICE ABANDONMENT * * * ACCOUNT DESTRUCTION PORTMAR" (R. 594) make that clear. The only reason the *Portmar* was compelled to be at Darwin until towed away, was physical damage, hence the above covenant or formula applies. Petitioner takes exception to the word "formula" as applied to the covenant. "Two times two are four", is as much a formula as the binomial theorem; and the plain English of the present covenant is as much a formula as the more com-

plicated clauses in *Searles* v. *Western A. Co.* (1906), 88 Miss. 260 and *Fireman's F. Ins. Co.* v. *Globe Nav. Co.* (1916, 9 Cir.), 236 F. 618. All clauses governing the right to abandon for constructive total loss have uniformly been given effect, superseding the "high probability" rule. *Columbian Ins. Co.* v. *Catlett* (1827), 12 Wheat. 383; *Wallace* v. *Thames & M. Ins. Co.* (1884), 22 F. 66; *Klein* v. *Globe & Rutgers F. Ins. Co.* (*The Tornado*) (1924, 3 Cir.), 2 F. 2d 137. The British Marine Insurance Act 1906, Sec. 60, cited by petitioner (*brief*, p. 57) specifically recognizes the validity of such provisions by the opening words: "*Subject to any express provision in the policy,*". Even covenants completely excluding constructive total losses are enforcible. *Burt* v. *Brewers' & Maltsters' Ins. Co.* (1876) 9 Hun 383, aff'd. (1879) 78 N. Y. 400; *Carr* v. *Security Ins. Co.* (1888) 109 N. Y. 504. The cases cited by petitioner (*brief, p.* 57, 62) are no exception and petitioner's characterization of them is clearly erroneous.

In *Orient Ins. Co.* v. *Adams* (1887) 123 U. S. 67, the policy contained two separate abandonment clauses. One clause precluded abandonment unless the injury equalled 50% of the insured value; the other, unless recovery and repair were "impracticable". This Court declined affirmance under the first clause but affirmed the Circuit Court under the second clause, saying at page 74:

> "The jury were distinctly told that the right to abandon depended upon the fact that it was impracticable to recover and repair the vessel".

In *Royal Exchange Assur.* v. *Graham & M. T. Co.* (1908, 7 Cir.) 166 F. 32, 36, the Court showed that the extent of damage satisfied both the "high probability" rule and the policy formula, and made the formula paramount when it significantly stated:

> "* * * but the right of abandonment depends *alone* upon the **fact** of such excess, * * *" (emphasis added).

In *Chicago S. S. Lines* v. *United States Lloyds Inc.* (1926, 7 Cir.) 12 F. 2d 733, the Circuit Court of Appeals did not pass upon the "high probability" rule, but denied recovery on the ground of unseaworthiness.

Klein v. *Globe & Rutgers F. Ins. Co.* (*The Tornado*) (1924, 3 Cir.) 2 F. 2d 137, the only reported decision on the present form of abandonment clause, is directly contrary to petitioner's assertion. The Court said:

> "Under above provision, if the *Tornado* could have been raised and repaired at a cost of less than $85,000. [the insured value], libelant had no right to claim a constructive total loss. * * * The testimony introduced in the instant case has convinced us that the libelant had no right, *under his contract,* to abandon the vessel to the respondent and recover for a constructive total loss. * * * but it must be remembered the existence of the **fact** that it [expense of recovery and repair] would so exceed the amount, constituting a constructive total loss, is the **criterion** of his right to abandon" (emphasis added) 2 F. 2d 141-2.

Mr. Justice Story's opinion in *Peele* v. *Merchants Ins. Co.* (1822) F. Cas. 10905; 3 Mason 27, cited and quoted by petitioner (*brief*, p. 55), did not involve any express covenant on the subject; nor did *Jeffcott* v. *Aetna Ins. Co.* (1942, 2 Cir.) 129 F. 2d 582.

Clearly the "formula" covenant supersedes the "high probability" rule. It is set forth as follows in *Appleman: Insurance Law and Practice*, (1942) Vol. 6, Sec. 3705:

> "Of course, the insured may not abandon under the high probability rule, where the policy fixes the right to abandon on certain specified terms."

In view of the foregoing, it is submitted that the "high probability rule" must yield completely to the policy formula; and that the District Court was in error in denying validity to the contract provision in the *Portmar* policies.

Petitioner asserts that "imminent peril of actual total loss" and "recovery and repair impossible" deny effect to the formula (*brief*, p. 54), but neither of the premises is correct.

The continuing imminent peril of Japanese attack in northern Australian waters affords no ground for abandonment, because *apprehension* alone is never a valid ground for abandonment. *Smith* v. *Universal Ins. Co.* (1821) 6 Wheat. 176, 185-7. But for the physical damage, the *Portmar* could have sailed away to Brisbane any night—just as she had originally sailed there in the face of expected Japanese attack.

Petitioner's alleged impossibility of recovery and repair is negated by the admitted fact that the *Portmar was* recovered and *was* repaired. Its claim on the ground that petitioner itself could not recover and repair and that the Government controls and priorities existed, is not supported by any citation and is indeed contrary to reported cases. *The Blairmore* (1898) A. C. 593, cited by petitioner, indicates that operation of natural causes or neutral persons or even underwriters acting fairly, may preclude claim of constructive total loss. In *Fireman's F. Ins. Co.* v. *Globe Nav. Co.* (1916, 9 Cir.) 236 F. 618 the vessel was salvaged by strangers. An owner cannot recapture his captured vessel, but its recapture by others before abandonment precludes constructive total loss. *Smith* v. *Uni-*

versal Ins. Co. (1821) 6 Wheat. 176; *Bainbridge* v. *Neilson* (1808, K. B.) 10 East 329; *Ruys* v. *Royal Ex. A. Co.* (1897) 2 Q. B. 135.

The high probability: Neither the District Court nor the petitioner has referred to two paramount factors in the high probabilities on April 8, 1942, namely: that the United States Army was desperate for ships, and that the energetic, resourceful Williams had a salvage lien to protect and collect. The master never weighed the probabilities at all beyond the obvious fact that she was damaged and aground, where, incidentally, she could have remained in practically the same condition for "a year or even longer" (R. 417, 443). The civilian Williams hired some privately owned pumps "valued at £1700" (R. 697) and floated the vessel in a few days (R. 689). No "reasonable calculations", as mentioned in *Bradlie* v. *Maryland*, 12 Pet. 378, were made by the master or anyone else at Darwin; and none of the "salvage" claims came to petitioner's notice until after August 19, 1942 (R. 634).

C. Total expense of recovery and repair.

The total expense of repair and recovery, as proven by the record are established by stipulation (R. 223), joint survey (R. 651) and court decree (R. 597). They aggregated $166,138.59 which is less than one-fifth of the expense necessary to permit abandonment of the *Portmar* as a constructive total loss. It is significant that the stipulated

sound value (R. 179)	$688,000
less "admitted" saived value (R. 685)	513,500
showed a loss of	$174,500

a figure very close to the proven expense of recovery and repair, $166,138.59, and to petitioner's estimate of $188,036.12 in the libel (R. 68).

The policy covenant superseded the "high probability" rule, and the expense of recovery and repair did not in

either case exceed the policy valuation. There was, therefore, no basis for declaring the *Portmar* a constructive total loss on April 8, 1942. What the *Portmar* may have been before the attempted abandonment, *i. e.*, on February 19, March 3, or March 10, 1942, has nothing whatever to do with the probabilities on April 8, 1942 when the *Portmar* had been floated and was able to carry a "pay load" when towed to Brisbane.

D. The invalid abandonment as a constructive total loss.

As demonstrated above, petitioner's attempted abandonment was obviously void, because the policies had expired before the loss was inflicted and also because the expense of recovery and repair was not great enough to warrant it, either under the covenant in the policies or under the "high probability" rule. Even if the factual background had permitted abandonment, there would be a much more serious consideration in the present matter, namely: the unqualified prohibitions of Sections 9 and 37 of the Shipping Act, 1916, which apparently void any transfer to the British respondents by abandonment or otherwise without previous approval of the Maritime Commission.

Section 9 of the statute provides for forfeiture of "any vessel or any interest therein owned * * * by a citizen of the United States and documented under the laws of the United States" "in any manner" transferred "to any person not a citizen of the United States" (46 U. S. C. 808). Section 37 declared that "when the United States is at war * * *, it shall be unlawful, without first obtaining the approval of the commission: * * * to * * * in any manner transfer * * * any vessel documented under the laws of the United States, or any interest therein, * * *" and declared any such transfer void (46 U. S. C. 835).

Abandonment was attempted on April 8, 1942 when the United States was at war. Respondents cannot agree with petitioner that there is no authority for the proposition, nor that the *Portmar* was a wreck on April 8, 1942, nor that the statute would not apply even if the *Portmar* had been a wreck.

The salved value in the Australian Court was fixed at $513,500 (R. 685). The *Portmar* was requisitioned for title as of November 17, 1942 at Brisbane under Section 902, Merchant Marine Act 1936, (R. 625), 46 U. S. C. 1242. More than ten years have passed since that time, but the United States has refused to pay any part of the "just compensation" provided for in the Act. If the attempted abandonment should be sustained there must be a *res judicata* to prevent circumvention of respondents' recoupment *pro tanto* (*i.e.*, to the extent at least of the $513,500) from the United States for its requisition of title to the *Portmar*.

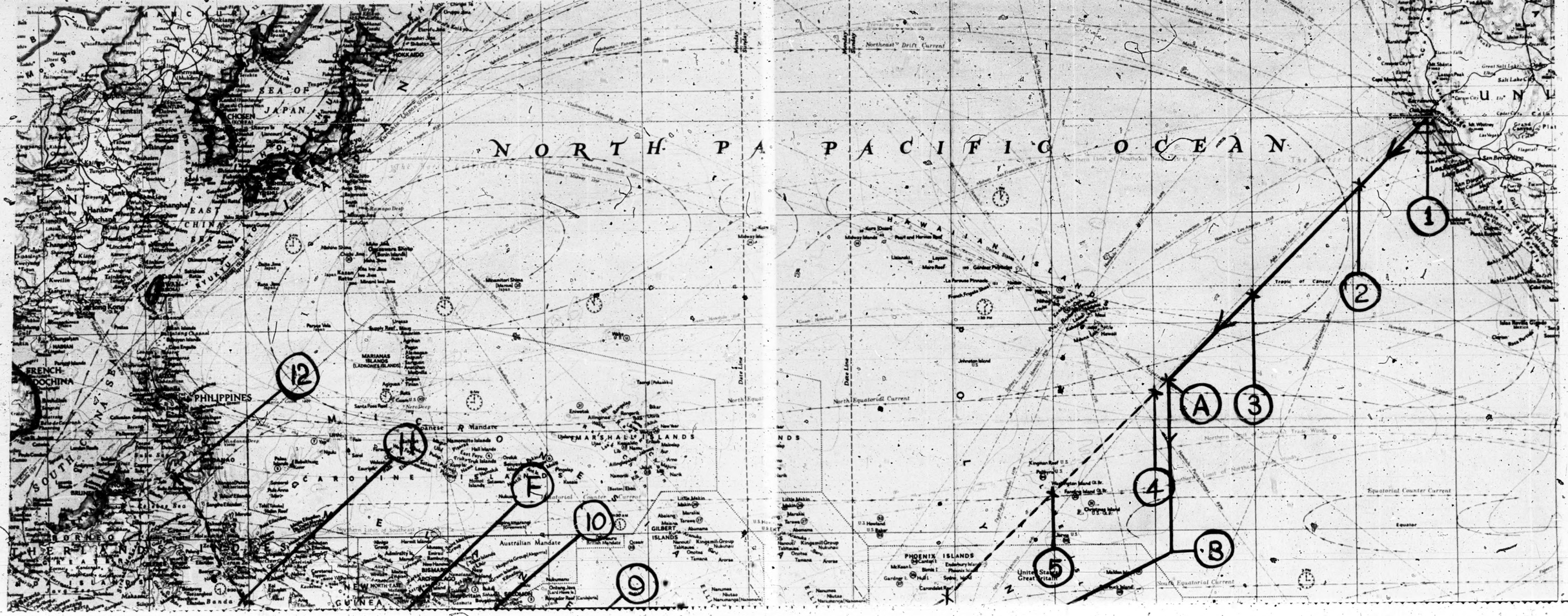
The District Court declined to rule on the matter, holding that there was a valid abandonment to respondents *without transfer of title* (R. 755). That holding contradicts the very essence of abandonment as a constructive total loss. Such abandonment must "put the underwriters completely in the place of the assured". *Chesapeake Ins. Co.* v. *Stark* (1810) 6 Cranch. 268, 272. It must operate, "in judgment of law, as a transfer of the property" *Walden* v. *Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 324. As stated in petitioner's brief (pp. 73-4): "The assured must yield up to the underwriter all his right, title and interest in the subject insured". *Patapsco Ins. Co.* v. *Southgate* (1831) 5 Pet. 604, 622. Petitioner correctly informed the master by cable: "TITLE VESTED UNDERWRITERS IF ABANDONMENT GOOD OTHERWISE REMAINS IN OWNERS" (R. 613).

It is also requisite that petitioner be competent to transfer full title to respondents, and there can be no waiver with respect thereto. *Rice* v. *Homer* (1815) 12 Mass. 230, 235; *Williams* v. *Smith* (1804) 2 Cai. (N. Y.) 13, 23, Rev. other grounds (1806) 2 Cai. Cas. (N. Y.) 110; *Younger* v. *Gloucester Ins. Co.* (1855) F. Cas. 5487; 2 Curt. 322, 327.

> "A legal abandonment cannot be effected unless the person who assumes to make it has at the time of the loss the power to make a legal transfer of the property abandoned." *Murray* v. *Great W. Ins. Co.* (1893) 72 Hun. 282; aff'd 147 N. Y. 711.

The legal status of the parties after rejection of a *valid* abandonment is "*quasi* agent or trustee" *Walden* v. *Phoenix Ins. Co.* (1810) 5 Johns. (N. Y.) 310, 324; but such status has never been held to validate an invalid abandonment.

Petitioner (*brief*, pp. 74-5) attempts to differentiate among tender, offer and notice of abandonment. No such distinction is recognized by statute and cases cited by it. The expressions are used interchangeably. In this record, Mather cabled Stephens "GIVE NOTICE ABANDONMENT" (R. 594) and Stephens obeyed by writing: "We have been instructed by the assured to tender abandonment" (R. 587-8). Petitioner cabled its Australian lawyers: "GIVING UNDERWRITERS NOTICE ABANDONMENT PORTMAR" (R. 607). Even in its libel, petitioner pleaded: "Thomas Stephens & Sons, Ltd., gave notice of abandonment" (R. 61), and again: "the abandonment made as of that date to respondents was a valid abandonment" (R. 63). The District Court was misled by petitioner's overemphasis on the word "tender" in Stephens' letter and introduced a new feature in the law that the transfer of title by abandonment was a matter of "negotiations" which "never reached the point where a transfer of title was made" (R. 755). The cases all hold


NORTH PACIFIC OCEAN
SEA OF JAPAN
EAST CHINA SEA
SOUTH CHINA SEA
PHILIPPINES
FRENCH INDOCHINA
MARIANAS ISLANDS
MARSHALL ISLANDS
GILBERT ISLANDS
PHOENIX ISLANDS
HAWAIIAN
Japanese Mandate
Australian Mandate
Northeast Drift Current
North Equatorial Current
Equatorial Counter Current
South Equatorial Current
Tropic of Cancer
Equator
Date Line
12
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that the essence of abandonment is the entire and absolute transfer of unencumbered title. *Bidwell* v. *Northwestern Ins. Co.* (1859) 19 N. Y. 179, 181; *Patapsco Ins. Co.* v. *Southgate* (1831) 5 Pet. 604, 622.

FIFTH POINT.

There is no merit to petitioner's invocation of waiver and estoppel against respondents.

Petitioner urges that this Court bar all consideration of respondents' defenses except the point that the insurance had terminated prior to the damage, because of the wording of the respondents' declination of liability summarized in Stephens' letter (R. 590-1). That letter, of which petitioner quoted a part, clearly constitutes a denial of liability on all grounds of termination of the coverage, except possibly intentional exposure to risk, but even that is clearly implied. Obviously the letter made no reference whatever to the invalidity of the attempted abandonment, because the question of abandonment has no relation whatever to the question of liability but only to amount and procedure after the question of liability has been determined.

The rule of law in insurance cases is that waiver of defenses can be invoked against an insurer only if (1) the insurer had full knowledge of the facts when it denied liability, and (2) the assured has been prejudiced because it could have remedied the unassigned grounds of defense if it had known the insurer intended to rely thereon. The rule is based on the principle of estoppel.

> "The assured must, however, establish that the company had full knowledge of the facts before he can take advantage of the defense of waiver." *Foster* v. *Yorkshire Insurance Co., Ltd.* (1938) 255 App. Div. 829; 7 N. Y. Supp. 2d 79, at page 80. Citing cases.

The record in the present case shows the petitioner gave the respondents the most meager facts, and the respondents had no other source of information. It is indeed strange that petitioner should now assert that there was ample time for investigation and consideration, when the shipmaster, who was there in person, was not permitted full investigation.

> "As was said by Mr. Justice Field in *Insurance Co.* v. *Wolff*, 95 U. S. 326, above quoted, the doctrine of waiver is only another name for estoppel, and can only be invoked where the conduct of the company has been such as to induce action in reliance upon it." *Hubbard* v. *Mutual Reserve Fund Life Association* (1897 C. C. D. R. I.) 80 Fed. 681 at pages 685, 686.

To invoke the doctrine of waiver,

> "There must, in addition, be evidence from which a jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury." *Devens* v. *Mechanics & Traders' Ins. Co.* (1880), 83 N. Y. 168 at page 173.

See also *Kerr* v. *Milwaukee Mechanics Insurance Co.* (1902 C. C. A. 8C), 117 Fed. 442, at page 445, and a full discussion of the law, with digest of many cases in *Taylor-Baldwin Co.* v. *Northwestern Fire & Marine Ins. Co.* (N. D. 1909), 20 Am. & Eng. Ann. Cases 432, and appended Note, pages 438, 439.

In all the insurance cases cited by petitioner on page 67 of its brief, there was full knowledge of the facts by the underwriter or a situation of prejudice to the assured. Neither factor existed in the case of the *Portmar*.

Finally, in *Royal Ins. Co.* v. *Martin* (1904), 192 U. S. 149, where the underwriter had denied liability on the ground that a fire loss had been caused by riot, an excepted peril, and the jury had given a verdict for the assured, this Court reversed on the ground that the Court below erred in not considering the evidence of change of ownership of the property, contrary to a provision in the policy, and said at page 167:

> "The case was not tried in accordance with a sound construction of the terms of the policy relating to the goods insured."

So in the case of the *Portmar,* even if the respondents' denial of liability had stated only the ground of termination of the insured venture (as erroneously claimed by the petitioner), and the Court should hold the insurance had not terminated, it must still consider and enforce all the terms and provisions of the policies.

Conclusion.

The decision herein of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, January 7, 1953.

Respectfully submitted,

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Of Counsel.

Appendix.

Photostatic Copy of Map, Petitioner's Exhibit 53, Showing the Originally Ordered Course of the *Portmar* (for the Philippines) in Dotted Line; and the Actual Movements of the *Portmar* in Solid Line.

(Opposite ☞)